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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1268

GEORGE MARTINEZ, et al.,

Appellants,

vs.

THE STATE OF CALIFORNIA, et al.,

Respondents.

On Appeal From The Court Of Appeal
Of The State Of California,
Fourth Appellate District, Division One

JURISDICTIONAL STATEMENT

DONALD McGRATH II, Esq.

THOMPSON, SULLIVAN, McGRATH
& McDONALD
A Professional Corporation
1200 Third Avenue
San Diego, California 92101
Telephone: (714) 234-6781

Attorneys for Appellants

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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JURISDICTIONAL STATEMENT

The Appellants, pursuant to United States Supreme Court Rule 13(2) and 15, file this statement on the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question and should exercise such jurisdiction in this case.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is reported at 85 Cal.App.3d 430, 149 Cal.Rptr. 519, and is attached hereto as Appendix "A".

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) as being an appeal which draws into question the validity of California Government Code §845.8(a) *infra*, page 4, on the ground that as construed it is repugnant to the Constitution of the United States.

Appellants seek damages from state officials for the wrongful death of their daughter. Demurrers to their Complaint were sustained on the ground that California Government Code §845.8(a) provides absolute immunity from civil liability for causing a loss of life because "there is a rational relationship between the state's purposes and the statute."

The appeal herein is from a final judgment decided and filed by the Court of Appeal for the State of California, Fourth Appellate District, Division One, on September 22, 1978. On November 15, 1978, Appellants' Petition for Hearing in the Supreme Court of the State of California was denied. Notice of Appeal to the Supreme Court of the United States was filed in the Court of Appeal of the State of California, Fourth Appellate District, Division One, on February 5, 1979.

As the Court of Appeal of the State of California explicitly rejected Appellants' challenge to the constitutionality of California Government Code §845.8(a), this matter is appropriately brought to this Court by appeal. *Sibron v. New York* 392 U.S. 40 (1968).

In the event that the Court does not consider appeal the proper mode of review, Appellants request that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

ADDITIONAL GROUND OF JURISDICTION

The Appellants also contend that the judgment is founded on another error, which though it involves a question not subject to review by this Court of appeal, nevertheless deprived the Appellants of a fair hearing. The Court of Appeal of the State of California found that Respondents had absolute immunity from suit in an action brought under 42 U.S.C. §1983. This error is included in the statement of the questions presented by the appeal hereinafter set forth. If this were the only error complained of, Appellants would be limited to a petition for writ of certiorari under 28 U.S.C. §1257(3). It is included on this appeal under the authority of *Prudential Insurance Company v. Check*, 259 U.S. 530, 547 (1922) and *Flournoy v. Wiener*, 371 U.S. 253, 263 (1944).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case also involves California Government Code §845.8(a) which states:

> "Neither a public entity nor a public employee is liable for: (a) any injury resulting from determining whether to parole or release a prisoner, or from determining the terms or conditions of his parole or release, or from determining whether to revoke his parole or release."

This case also involves 42 U.S.C. §1983 which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

I. Whether California Government Code §845.8(a), When Construed To Grant Absolute Immunity To State Officials From Civil Liability For Their Acts Which Caused A Loss Of Life Violates The Due Process And Equal Protection Clauses Of The Fourteenth Amendment To The Constitution Of The United States.

II. Whether State Officials Have Absolute Immunity From Civil Liability In An Action Brought Pursuant To U.S.C. §1983 For Acts Which Caused A Loss Of Life.

STATEMENT OF THE CASE

RICHARD JUNE-JORDAN THOMAS was convicted on December 12, 1969 of the attempted forcible rape of two young females at knifepoint in Tecolote Canyon in San Diego, California. From January to July, 1970, THOMAS was committed to the Atascadero State Mental Hospital for observation where he was designated as a "Medically Disordered Sex Offender" not amenable to treatment. He was subsequently sentenced by the Honorable LELAND C. NEILSEN of the San Diego Superior Court for a period of six months to twenty years in April, 1970, with that court making specific comment that THOMAS should not be paroled. Although he had been designated as a "mentally disordered sex offender," had been adjudged by the Atascadero State Mental Hospital as "not amenable to treatment," and in fact had received no treatment while incarcerated, THOMAS was subsequently paroled on March 10, 1975. THOMAS was

paroled even though he admitted to authorities that he did not feel himself ready for parole and feared actions he might take if he in fact were paroled. THOMAS' parole was subject to special conditions, including the condition that he regularly appear at a "parole out-patient clinic." In fact, THOMAS was not supervised, and the conditions which were attached to his parole were not met, and he did not regularly appear at his designated "parole out-patient clinic."

RICHARD JUNE-JORDAN THOMAS subsequently kidnapped and murdered MARY ELLEN MARTINEZ, age 15, on Ausgust 1, 1975, in the same Tecolote Canyon of San Diego, California. THOMAS was duly convicted and on April 13, 1976, the Honorable EDWARD T. BUTLER sentenced THOMAS to death in the San Quentin state prison gas chamber.

Appellants' original Complaint for Damages for Wrongful Death and Civil Rights Violation (C.T. 18) was filed with the San Diego Superior Court on May 25, 1976. The Honorable LOUIS M. WELSH filed a Minute Order (C.T. 94) with the Court on September 1, 1976, which sustained Respondents' Demurrer (C.T. 18) as to causes of action I, II, III, IV, V and VI, with leave to amend causes of action I and VI.

Appellants' First Amended Complaint (C.T. 97) repleads causes of action II, III, IV and V verbatim from their original Complaint (C.T. 1) and incorporates amended portions of causes of action I and VI. The latter two causes of action were subsequently demurred to by Respondents on October 14, 1976, and the Honorable DOUGLAS R. WOODWORTH sustained Respondents' Demurrer (C.T. 18) as to those causes of action on November 8, 1976, without leave to amend.

Appellants then appealed from the Notice of Entry of Judgment (C.T. 132) of November 24, 1976 on December 20, 1976. The Court of Appeals of the State of California, Fourth Appellate District, Division One, affirmed the lower Court's ruling on September 22, 1978. The Supreme Court of the State of California denied Appellants' Petition for Hearing on November 15, 1978 and the judgment of the Court of Appeals was entered on November 27, 1978.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Constitutionality of Government Code §845.8(a)

Appellants' Complaint seeks damages for the wrongful death of their daughter and for the deprivation of her right to life without due process. The Complaint alleges malice and bad faith on the part of Respondents.

Respondents demurred on the ground that Government Code §845.8(a) provided them with absolute immunity even for their acts done in bad faith or with malice. Appellants' response stated:

> "If, however, this court should find that Government Code §845.8(a) does grant total immunity in [the] situations enumerated above, then Plaintiffs contend that Government Code §845.8(a) is unconstitutional as applied to them in that: (a) MARY ELLEN MARTINEZ had a federally protected right to life under the Constitution of the United States, (b) the state of California, through the acts of its employees, proximately caused the

death of MARY ELLEN MARTINEZA, (c) as applied to Plaintiffs, Government Code §845.8(a) resulted in the deprivation of life without due process in that it authorized, condoned, and encouraged the negligent and/or willful, wanton and malicious acts of the defendant employees." (C.T. 58)

The trial court rejected this contention finding Respondents' immunity to be absolute:

> "It is clear that a public employee is not liable for an injury resulting from his discretionary acts, even if the discretion is abused. . . ." (C.T. 94)

The Court of Appeal stated Appellants' contentions as it understood them:

> "MARTINEZ says the statute, Government Code §845.8(a) is unconstitutional because it permits the deprivation of life, a fundamental right, without due process. He suggests the statute, if it confers absolute immunity, encouraged the actions resulting in MARY ELLEN's death, and thus requires a compelling state interest." (Appendix "A", pages 7-8)

The court squarely rejected Appellants' contention:

> ". . . The legislature has broad power to control governmental tort liability . . . The stated purpose of §845.8(a) is to allow correctional personnel to make determinations of release or parole unferrered by any fear of tort liability . . . There is a rational relationship

> between the state's purposes and the statute . . . There is no liability here. . . ." (Appendix "A", page 8)

II. Absolute Immunity Of Officials From Suit Under Civil Rights' Act 42 U.S.C. §1983.

Plaintiffs' Complaint specifically alleges that the malicious acts of Respondents caused the death of MARY ELLEN MARTINEZ and thereby deprived her of the fundamental right of life secured against deprivation by state action without due process by the Constitution of the United States. The trial court found official immunity an absolute bar to an action brought under 42 U.S.C. §1983:

> "The Federal Civil Rights' Act, 42 U.S.C. §1983 provides wrongful death benefits '. . . if such is permitted by state law.' (Plaintiffs' Memorandum of Points and Authorities, page 15) Since this court concludes that state law does not permit this action, none accrues under federal law." (C.T. 95-96)

The Court of Appeal acknowledged the issue before it as follows:

> "MARTINEZ's fifth cause of action alleges violation of the Federal Civil Rights Act . . . saying the acts of individual Respondents . . . caused and deprived MARY ELLEN of her life and liberty. He points out that governmental immunity is not an absolute bar to such a suit . . . He argues that public policy considerations support the application of a restricted immunity with regard to civil rights actions

> brought by injured citizens . . . An official who acts maliciously should be liable . . . The right to life and physical safety may be more important than immunity." (Appendix "A", pages 5-7)

The court clearly rejected this argument:

> "As members of the Adult Authority, they are performing quasi-judicial functions when they make determinations regarding parole and are immune from suit under the Civil Rights Act." [Opinion, p. 7]

A timely Petition for Hearing was denied by the Supreme Court of California on November 15, 1978, and the judgment of the Court of Appeal was entered on November 27, 1978.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I

PRELIMINARY STATEMENT

The incidence of violent crimes in our country is among the most significant social issues of our day. Of particular concern are those violent crimes committed by convicted felons released on parole as rehabilitated. The overwhelming evidence is to the effect that our prisons are totaly ineffective in rehabilitation. Indeed, it seems that prison effectively turns first-time offenders into confirmed, life long criminals. A shocking proportion of all violent crimes is committed by persons who have been convicted repeatedly of such crimes but who are routinely releasted as rehabilitated after a fraction of their sentence is served.

In light of figures showing astronomically high rates of recidivism, it is outrageous to expect the public alone to bear the risk that these rehabilitative efforts will fail without holding parole officials to a "good faith" requirement.

Appellants acknowledge the heavy burden of proof that accompanies an action brought against officials covered by a qualified immunity. Whatever atrocities may be visited on innocent members of the public by criminals released by parole officials in the negligent performance of their duties is without redress; but surely if the burden be met and it be shown that officials have acted in "bad faith," the public welfare is ill-served by the shield of absolute immunity.

The Supreme Court of Arizona came to precisely this conclusion in *Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977).

> ". . . The question arises whether such unbridled discretion is appropriate in our modern society . . . We have come to this conclusion because of the increasing power of the bureaucracy - the administrators - in our society . . . The more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their most outrageous conduct. There may even be some deterrent value in holding officials responsible for shocking, outrageous actions. In any case, democracy by its very definition implies responsibility . . . In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous . . . It is clear that the policy reasons

> for official immunity are much weaker than for judicial immunity. Thus, logic requires a lesser immunity; for immunity deprives individuals of a remedy for wrongdoing and should be bestowed only when at the level necessary. We hold that absolute immunity for public officials in their discretionary functions acting in other than true judicial proceedings is not required and indeed is improper." *Id.* 1232-1233.

However, this Court is not asked to assess the general propriety of the absolute immunity doctrine. Rather, this Court must determine the impact of that doctrine on violations of fundamental constitutional rights. Appellants submit that no compelling state interest justify absolute immunity for administrative officials in this context.

II

CALIFORNIA GOVERNMENT CODE SECTION 845.8(a) IS UNCONSTITUTIONAL AS CONSTRUED BY THE CALIFORNIA COURT OF APPEAL

A. General

The Court of Appeal of the State of California interpreted Government Code §845.8(a) as a grant of absolute and total immunity to any person holding office as a member of the California Adult Authority. Such immunity must be regarded as a mandate to Respondents to exercise power in a reckless or malicious manner, both within and without the scope of their official duties. Petitioners contend that so construed or so applied to the facts of this case, Government Code §845.8(a) is

unconstitutional in that it permits the deprivation of life without due process.

B. Life Is A Fundamental Right

Life is a fundamental right expressly protected from deprivation by state action without due process as provided in the Fourteenth Amendment to the U.S. Constitution. Like those protections in the Bill of Rights which have been incorporated in the due process clause of the Constitution, the right to physical safety at the hands of the state is ". . . of the very essence of a scheme of ordered liberty . . . a 'principal of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Palko v. Connecticut,* 302 U.S. 319, 325 (1937).

C. Due Process Demands That Life Not Be Denied Unless Justified By A Compelling State Interest

Recognizing that the right to life is a fundamental interest, and that California Government Code §845.8(a) did encourage and facilitate the deprivation of Petitioner's life, the question remains as to what the demands of due process are with respect to the facts of this case. Petitioners contend that life is a right so fundamental that its deprivation may be justified only by a compelling state interest.

This Court has recognized substantive rights of privacy, procreation, contraception, child-bearing, and free speech which can be limited only by a showing of a compelling state interest. Life, a right as fundamental as any recognized, deserves just as formidable a protective barrier.

In *Roe v. Wade*, 410 U.S. 113 (1973), Justice Blackmun, in discussing the protection afforded a woman's right to control her pregnancy, stated:

> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interst at stake. . . ." *Id.* at 155.

The Court of Appeal committed reversible error by holding that the state statute may abridge the fundamental right to life without a compelling state interest. The Court held that "there is a rational relationship between the state's purposes and the statute," (Opinion, page 8) and found that to be a sufficient basis for the constitutionality of the statute. Such holding was plain error and is sufficient grounds for reversal.

D. Government Code §845.8 Serves No Compelling State Interest In The Context Of This Case

An analysis of the state interest served by the absolute immunity doctrine shows that those interests are either not compelling or that absolute immunity is unnecessary to their accomplishment. One state interest which Government Code §845.8 serves is to allow members of the California Adult Authority to perform their jobs without the pressure and fear of civil suit. However, this interest is best served by a qualified immunity for the same reasons stated in discussing the appropriate extent of federal common law immunity and actions under 42 U.S.C. §1983, *infra*. In summary, those

reasons are that:

1. A good faith standard does not inhibit legitimate action by members of the California Adult Authority.

2. It is not in the public interest to encourage the reckless and malicious release of dangerous felons.

3. The fundamental interest at stake in this case is more important that the state's interest in protecting its officials' bad faith activity.

A second compelling state interest conceivably justifying Government Code §845.8 is the public safety. Here, a valid distinction must be drawn between suits by prisoners, where Government Code §845.8 has been construed by some circuits to grant absolute immunity, and suits by members of the public for injuries or death caused by paroled prisoners. There is a significant state interest in immunizing California Adult Authority members from suit by prisoners denied parole in that potential civil liability may cause board members to parole dangerous felons who should not be released. The public safety is therefore a compelling state interest which certainly justifies a qualified immunity, and which may justify an absolute immunity in suits by prisoners.

In contrast, a suit by a member of the public for injuries or death caused by a paroled prisoner discourages the reckless and malicious parole of felons. The state's interest in the public safety is best served by holding members of the California Adult Authority to a "good faith" standard of conduct, not by immunizing them from liability for the reckless and malicious release of dangerous felons into society.

A third compelling state interest is the right of a prisoner to a fair parole hearing. Potential civil liability to injured members of the public could cause members of the California Adult Authority to deny parole when it is justified. However, Petitioners believe that qualified immunity provides sufficient protection for the prisoner. All that is required of state officials is good faith, certainly a minimal standard of conduct. The prisoner has no legitimate interest in being paroled when a good faith appraisal of his record shows that he is not entitled to be released.

A grant of absolute immunity is not justified by any of these potentially compelling state interests in the context of a suit by an injured member of the public. When state interests impinge on fundamental rights, "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. . . ." *Roe v. Wade,* 410 U.S. 113, 155 (1973). The legitimate state interests at stake in this case may be fully realized by a qualified immunity. Therefore, the broad sweep of Government Code §845.8 as construed by the Court of Appeals is unjustified and amounts to a denial of due process.

III

STATE PAROLE OFFICIALS HAVE QUALIFIED IMMUNITY FROM CIVIL LIABILITY FOR THEIR ACTS WHICH VIOLATE THE CONSTITUTIONAL RIGHTS OF INDIVIDUAL MEMBERS OF THE PUBLIC PURSUANT TO 42 U.S.C. §1983

A. Appellants Have Alleged A Violation Of The Federal Civil Rights Act 42 U.S.C. §1983.

Appellants' Fifth Cause of Action of their FIRST AMENDED COMPLAINT is for damages for violation of Federal Civil Rights pursuant to 42 U.S.C. §1983.

That cause of action alleges that the acts of the individual Respondents, under color of state law, caused the death of MARY ELLEN MARTINEZ. To the extent that the Appellants can prove their allegations at trial with the requisite burden of proof, it is clear that Respondents' acts under color of state law subjected MARY ELLEN MARTINEZ to deprivation of a fundamental constitutional right without due process. Appellants have, therefore, stated the prima facie elements for a cause of action under 42 U.S.C. §1983.

B. The Only Issue Which Remains In Dispute Is Whether The Immunity Enjoyed By The Respondents Is Qualified Or Absolute.

The Court of Appeal of the State of California held that Respondents were immune from civil liability for their acts: "As members of the Adult Authority, they are performing quasi-judicial functions when they make determinations

regarding parole and are immune from suit under the Civil Rights Act." In Paragraphs XV and XXVIII of their FIRST AMENDED COMPLAINT which are incorporated by reference in their Section 1983 cause of action, Appellants have pled facts alleging malice. (C.T. 104) The conclusion of the Court of Appeal is, therefore, that state parole officials are absolutely immune from suit under 42 U.S.C. §1983 even if their acts are done with malice and amount to wilful and wanton misconduct.

Appellants assert that these Respondents enjoy only a qualified immunity as to injuries to the public, which does not protect their acts done in bad faith.

C. Absolute Immunity Is Inappropriate To Civil Rights Actions Under 42 U.S.C. §1983.

The case of *Scheuer v. Rhoades*, 416 U.S. 232 (1974), illustrates the inappropriateness of applying absolute immunity in situations involving alleged civil rights violations. *Scheuer, supra*, involved an action brought under §1983 for the death of students killed by Ohio national guardsmen at Kent State University in May, 1970. Appellants brought suit against the governor, adjutant general and assistants because they:

> " 'Intentionally, recklessly, willfully, and wantonly' caused an unnecessarily deployment of the Ohio national guard on the Kent State campus . . . which resulted in the death of plaintiffs' decedents . . . the complaints alleged that each of the named defendants, in undertaking such actions, acted

> either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of the office." *Id.* at 235.

Chief Justice Burger, writing for a unanimous court, carefully analyzed the asserted justifications for immunity. Taking into account the need of high executive officials to act swiftly and promptly and to be able to rely on the information available to them, he concluded that:

> "Under the criteria developed by precedents of this court, §1983 would be drained of meaning if we were to hold that the acts of a governor or high executive officer have 'the quality of a supreme and unchangeable edict, overriding all conflicting rights' . . . These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Id.* at 247-248.

The reasons for limiting immunity which were advanced in the *Scheuer* case, *supra*, are equally applicable to the present fact situation. Indeed, defendants in *Scheuer* had a greater justifiable expectation that they would be immune from

liability than Respondents have. For one thing, the executive officers in *Scheuer* were forced by the nature of the situation to make a quick decision as to whether to release a potentially dangerous force into society based on the information available to them at the time. In contrast, Respondents could and should have taken every precaution, gathered whatever informtion was reasonably necessary for a fair and complete evaluation before releasing this certainly dangerous force into society.

The *Scheuer* situation is one in which the freedom to act is to be encouraged because any impediment to quick action may resound to the detriment of the public safety. Yet, the court correctly concluded that absolute immunity was unnecessary to achieve the requisite freedom of action. In contrast, in the parole of dangerous felons, the same considerations cut in the opposite direction. Greater freedom of action is a potential hazard to public safety. In this area of official conduct, it is in the public's interest to discourage precipitous action as well as the reckless and malicious action herein alleged. The rights of prisoners to a fair parole hearing are not prejudiced by the imposition of a "good faith" standard of conduct on parle board officials. But absolute immunity is a blank check which does nothing for the legitimate interests of prisoners or society, but rather encourages reckless and malicious action which endangers the public.

D. Qualified Immunity Has Been Applied To "Quasi-Judicial" Officials.

Courts have generally drawn a distinction among branches of government as to whether absolute or qualified immunity is appropriate. These distinctions have proven difficult to apply in the ever-growing "fourth branch of government," the bureaucracy. Our citizens have increasing contact with government in the form of administrations, authorities, boards, commissions and departments, which though nominally a part of the executive branch, perform legislative and judicial as well as executive functions. But even though bureaucratic bodies may perform judicial functions, the non-public nature of bureaucratic proceedings justifies application of a good faith requirement. The devices designed to protect abuse of the judicial process are generally absent from bureaucratic proceedings, including those of parole boards.

> "For years, the legislature has neglected its responsibility of providing guidelines for boards charged with parole decision making . . . the parole board is one of the last bastions of unchecked arbitrary power in America." California State Assembly, Report of the Select Committee on the Administration of Justice, Parole Board Reform in California, Order Out of Chaos, (1970).1/

1/ Justice Hugo Black once stated:

> "In the course of my reading-by no means confined to law-I have reviewed many of the world's religions. The tenets of many faiths hold the deity to be a trinity. Seemingly, the parole boards, by whatever names designated in the various states, have in too many instances sought to enlarge this to include themselves as members."

For just this reason, it is in the public interest to impose a minimum standard of conduct on these officials.

In *Wood v. Strickland,* 420 U.S. 308 (1975), two girls were suspended from high school for possession of intoxicating beverages at a school activity. The students brought an action for damages under 42 U.S.C. §1983 against the school board, claiming that their federal constitutional rights of due process had been denied under color of state law. Justice White's opinion for the court analyzed the nature of the particular officials:

> "As the facts of this case reveal, school board members function at different times in the nature of legislatures and adjudicators in the disciplinary process." *Id.* at 319.

Nevertheless, the court found absolute immunity unjustified:

> ". . . The judgment implicit in this common-law development is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcuseable deprivations." *Id.* at 320.

If the rights of high school students not to be expelled is of sufficient importance that school board members may be subjected to a minimum standard of conduct, then it is reasonable to expect that the life of a high school student is also of sufficient import that parole board members should be subjected to the same minimum standards. It must be underscored that the minimum standard of "good faith"

imposed by the qualified immunity test of the *Scheuer* and *Wood* cases imposes a heavy burden of proof upon Appellants. In addition to proving the elements of a cause of action under 42 U.S.C. §1983, they must show a lack of "good faith" on the part of Respondents. Thus, the question is properly framed as follows: Could MARY ELLEN MARTINEZ state a cause of action against a school board whose bad faith actions expelled her from school, but be barred from stating a cause of action against parole board members whose bad faith actions caused her death?

The *Wood* decision shows that it is appropriate to apply qualified immunity to government officials who are part of the executive branch, but who perform "quasi-judicial" functions. The school board in *Wood* was acting in much more of a judicial capacity than were Respondents herein. With respect to Appellants the individual named Respondents performed no judicial function whatsoever. Respondents' judicial function is in relation to the prisoner seeking parole. In relation to MARY ELLEN MARTINEZ, Respondents' actions are more akin to those of the defendants in *Scheuer, sura,* who made an intentional decision to send a dangerous force out into the public.

In *Stump v. Sparkman,* 435 U.S. 349 (1978) this Court split five-four on the issue of immunity for a state court judge who had ordered a fifteen year old girl sterilized. But the arguments in favor of absolute immunity for judicial officers is much stronger than that for parole officials. Parole board proceedings are not open to public attendance, are not reported and made a public record and lack many of the procedural protections of judicial hearings. The public has no

representation at such proceedings and cannot appeal a grant of parole. Under such circumstances it is appropriate to require good faith as a predicate to immunity for bridging fundamental constitutional rights.

CONCLUSION

Based on the foregoing authorities this Court has jurisdiction of this appeal under §1257(2), Title 28, United States Code.

Respectfully submitted,

THOMPSON, SULLIVAN,
McGRATH & McDONALD

By: DONALD McGRATH, II

and

WALTER P. CHRISTENSEN

Attorneys for Petitioner

APPENDIX

COURT OF APPEAL - FOURTH DIST.
FILED
OCT 12 1978
ROBERT L. FORD, Clerk
W. Deaton
DEPUTY CLERK

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GEORGE MARTINEZ, et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA, et al., Defendants and Respondents.	4 Civ. No. 16386 (Superior Court No. 382460)

[Modification of Opinion.]

THE COURT:

The opinion in the above entitled matter filed on September 22, 1978 is modified as follows:

Starting with page 5, line 6, delete:

> "*Anderson v. State of California*, 83 Cal.App.3d 188, 196"; and on the same page, second paragraph, line 7, the word "which" in the quote should be in brackets as it is a substitution for the word "however," so the quote reads: "ministerial implementation of correctional programs [which] can hardly . . ."

COURT OF APPEAL - FOURTH DIST.
FILED
SEP 22 1978
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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GEORGE MARTINEZ, et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA, et al., Defendants and Respondents.	4 Civ. No. 16386 (Superior Court No. 382460)

APPEAL from a judgment of the Superior Court of San Diego County. Louis M. Welsh and Douglas R. Woodworth, Judges. Affirmed.

George Martinez appeals the judgment following an order sustaining State's demurrer without leave to amend.

Richard June-Jordan Thomas was convicted on December 12, 1969 of attempted forcible rape. He was sent to Atascadero State Hospital for six months where he was designated a "Mentally Disordered Sex Offender" (MDSO), not amenable to treatment. He was sentenced to prison for from six months to 20 years in April 1970 and was paroled

five years later on condition he appear regularly at a "parole outpatient clinic." Five months after his release Thomas kidnapped and murdered Mary Ellen Martinez, a 15 year old.

George Martinez filed suit for his daughter's wrongful death and for civil rights violations in six causes of action alleging defendants were negligent in releasing Thomas, failed to supervise Thomas properly while he was on parole, violated the Federal Civil Rights Act[1]/ and failed to warn females Thomas was loose. He sought compensatory and punitive damages. We consider each cause of action in turn.

The first cause of action alleged the defendants were employed by the California Department of Corrections and the Adult Authority, had a duty to be reasonably careful in paroling prisoners and had breached that duty because no prudent, reasonable person knowing Thomas' history would have released him. Martinez says governmental immunity provided by Government Code section 845.8(a)[2]/ does not apply because the employees here were acting outside the course and scope of their employment. However, even if

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FOOTNOTE 1: 42 U.S.C.A. §1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

FOOTNOTE 2: This statute states: "Neither a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release. (b) Any injury caused by: (1) An escaping or escaped prisoner; (2) An escaping or escaped arrested person; or (3) A person resisting arrest."

these employees abused their discretion by granting parole knowing Thomas had tortured two girls in attempting to rape them, was an untreatable MDSO with a recommendation of no parole, had received no psychiatric treatment during his incarceration and had no psychiatric evaluation after his request this does not make them liable. The statute by its own terms releases an employee from any liability stemming from the exercise of his discretion in determining whether a prisoner should be released (see Gov. Code §820.2; see *State of California v. Superior Court*, 37 Cal.App.3d 1023, 1026).

As for the charge these employees were not acting within the scope of their employment, there are no allegations they were doing anything other than what they were hired to do, that is, determine when prisoners are to be paroled (*Burgdorf v. Funder*, 246 Cal.App.2d 443, 448).

In his second cause of action Martinez says the State's employees were negligent in "performing ministerial acts of release." He claims Government Code section 845.8(b) grants employees absolute immunity for discretionary and ministerial acts when dealing with escapees, while section 845.8(a) covers only those injuries flowing from "determinations" about parole (see fn. 2; *County of Sacramento v. Superior Court*, 8 Cal.3d 479). In sort, he says section 845.8(a) confers discretionary immunity but not absolute immunity. In making a decision to release a prisoner the actual decision, including the ministerial act of applying established rules and regulations to the particular case in question, is covered by governmental immunity (*State of California v. Superior Court, supra*, 37 Cal.App.3d 1023, 1027-1028). Not covered are ministerial acts in carrying out the decision to release the person, and an allegation of negligence must be determined on a case-by-case basis (*Johnson v. State of California*, 69 Cal.2d 782, 797; see *Morgan v. County of Yuba*, 230 Cal.App.2d 938, 942). In this count Martinez does not allege

negligence occurring after the decision to release Thomas. The complaint, by reference, incorporates allegations from the first count that: the employees knew Thomas had tortured the girls during the attempted rapes; he had been declared an untreatable MDSO; it had been recommended he not be paroled; he had received no psychiatric treatment; and, had no psychiatric evaluation within 30 days of his request. All of these acts or omissions are part of the discretionary act of releasing a prisoner and come within the government's immunity.

In this third cause of action Martinez says the State was negligent in failing to warn females using Tecolote Canyon of the danger now that Thomas was released. At oral argument he agreed this count should be dismissed because there was no continuing relationship between the State and the victim (*Whitcombe v. County of Yolo*, 73 Cal.App.3d 698, 713; *Anderson v. State of California*, 83 Cal.App.3d 188, 196).

In his fourth cause of action Martinez claims the State wantonly, wilfully and maliciously failed to supervise Thomas. The decision on what conditions to impose upon a parolee including, for example, the imposition of a certain amount of supervision is part of the determination in section 845.8(a) which is immune from liability. However, supervision of a parolee consists of the "ministerial implementation of correctional programs which can hardly . . . be isolated from discretionary judgments in adopting such programs." (See *County of Sacramento v. Superior Court, supra*, 8 Cal.3d 479, 485). Thus, for correctional activities, both discretionary decisions and their ministerial implementation come under the blanket of immunity (*Whitcombe v. County of Yolo, supra*, 73 Cal.App.3d 698, 714) and Martinez has not stated a cause of action.

Martinez's fifth cause of action alleges violation of the Federal Civil Rights Act (see fn. 1), saying the acts of the individual respondents under Penal Code sections 5075 and 5077[3]/ caused and deprived Mary Ellen of her life and liberty. He points out that governmental immunity is not an absolute bar to such a suit (*Kletschka v. Driver*, 411 F.2d 436, 448). However, official acts are privileged if they were done within the scope of their official duties (*Ahlstrand v. Lethert*, 319 F.Supp. 283, 284). As members of the Adult Authority, they are performing quasi-judicial functions when they make determinations regarding parole and are immune from suit under the Civil Rights Act (*Fitzgerald v. Procunier*, 393 F.Supp. 335, 343).

Martinez claims Mary Ellen's death resulted from actions and omissions above and beyond the actual processing of applications for parole, such as the failure to warn, and the failure to supervise Thomas. In addition, he argues that public policy considerations support the application of a restricted immunity with regard to civil rights actions brought by injured citizens. We weigh his arguments propounding liability against the local rule of immunity (*Kletschka v. Driver, supra*, 411 F.2d 436, 448). The factors Martinez cites against absolute immunity are: an official who acts maliciously should be liable; it may not be in the public's interest always to have an official execute his duties with the utmost zeal; other social values, for example, the right to life and physical safety, may be more important than immunity; and indemnity by the State reduces the consequences of the liability of public officials, However, there

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FOOTNOTE 3: Section 5075 concerns the members, appointment, term, vacancies and qualifications of persons on the Adult Authority while section 5077 deals with granting and revoking of parole by the Adult Authority.

are no facts here to show malice. Thomas was eligible for parole; the members of the Adult Authority determined he was ready for it. There is no sure formula for the members to know when a convict is rehabilitated and ready to reenter society. Yet it is important for the well-being of both society and the individual, to release persons as soon as they are rehabilitated. It is to society's advantage to try a variety of rehabilitative efforts and to use the maximum flexibility in facilitating the individual's reentry into society. In order to accomplish these aims it is necessary for public officials to make these decisions without fear they will be liable if they are wrong (see *Whitcombe v. County of Yolo, supra*, 73 Cal.App.3d 698, 710, fn. 11, 716). There is no liability for these injuries as pleaded under the Civil Rights Act.

In his sixth cause of action Martinez charges the State was negligent in failing to revoke Thomas' parole, supervise him properly and warn young females after it learned of its agents' unauthorized acts in releasing him. Since the acts of its employees are covered by governmental immunity, as discussed earlier, the State is not liable.

Martinez says the statute, Government Code section 845.8(a), is unconstitutional because it permits the deprivation of life, a fundamental right, without due process. He suggests the statute, if it confers absolute immunity, encouraged the actions resulting in Mary Ellen's death and, thus, requires a compelling state interest. However, the Legislature has broad powers to control governmental tort liability limited only by the rule it not act arbitrarily (*Reed v. City & County of San Francisco*, 237 Cal.App.2d 23, 24). The California Tort Claims Act as a whole (Gov. Code §§810 et seq.) has been found constitutional (*Datil v. City of Los Angeles*, 263 Cal.App. 2d 655, 660-661). The stated purpose of section 845.8(a) is to allow correctional personnel to make determinations of release or parole unfettered by any fear or tort liability (Law Rev. Com. Comment). To

impose tort liability would have a chilling effect on the decision making process, impede implementation of trial release programs and prolong incarceration unjustifiably for many prisoners. There is a rational relationship between the State's purpose and the statute.

Martinez says the trial court abused its discretion in sustaining the demurrers without leave to amend. However, leave to amend is properly denied when the facts are not in dispute, the nature of the claim is clear but there is no liability under substantive law (*Sackett v. Wyatt*, 32 Cal.App.3d 592, 603). Here the only questions were legal ones: whether the immunity of Government Code section 845.8(a) applied, whether *Johnson v. State of California, supra*, 69 Cal.2d 782, 797) applied, whether the Federal Civil Rights Act applied and whether the statute was constitutional. Under the facts as stated there is no liability here and it would be futile to permit further amendment.

The judgment is affirmed.

Brown
P.J.

WE CONCUR:

Colaw
J.

Whiney
J.

Supreme Court, U.S.
FILED
JUL 5 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1268

George Martinez, et al.,

Appellants,

—v.—

State of California, et al.,

Appellees.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

FILED FEBRUARY 13, 1979

PROBABLE JURISDICTION NOTED MAY 21, 1979

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DONALD MCGRATH II, ESQ.
THOMPSON, BUNKER, SULLIVAN & MCGRATH
A Professional Corporation
1405 Security Pacific Plaza
San Diego, California 92101
(714) 234-6781

In Association With

WALTER P. CHRISTENSEN, ESQ.
Attorney at Law
2550 Fifth Avenue
Suite 515
San Diego, California 92103
(714) 232-8971

Attorneys for Plaintiffs

FILED
BUSINESS DIVISION
MAY 25 1976
ROBERT D. ZUMWALT
CLERK, SAN DIEGO COUNTY
CALIFORNIA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

GEORGE MARTINEZ, PATRICIA MARTINEZ, MICHELLE MARTINEZ by her Guardian Ad Litem GEORGE MARTINEZ, and MATTHEW MARTINEZ, by his Guardian Ad Litem, GEORGE MARTINEZ, Plaintiffs, vs. THE STATE OF CALIFORNIA, RAYMOND PROCUNIER, HENRY KERR, BERNARD FORMAN, CURTIS LYNUM, L. M. EDMAN, EDWARD BARLES, and DOES I through L, Inclusive, Defendants.	CASE NO. 382460 COMPLAINT FOR DAMAGES FOR WRONGFUL DEATH AND FOR CIVIL RIGHTS VIOLATION

COMES NOW Plaintiffs and complain and allege as follows:

I

That Plaintiff MICHELLE MARTINEZ, age 15, and Plaintiff MATTHEW MARTINEZ, age 13, are minors and by Order of the above-entitled Court duly given and made on May 25, 1976, Plaintiff, GEORGE MARTINEZ, was duly appointed Guardian Ad Litem of said minors for the purposes of bringing this action and ever since has been, and still is, the duly appointed acting Guardian Ad Litem of said minors.

II

That prior to the commencement of this action and on November 7, 1975, Plaintiffs filed a claim for damages with the State Board of Control. That said claim was denied on December 23, 1975. That said claim was filed within one hundred (100) days of the death of MARY ELLEN MARTINEZ on August 1, 1975. That this action has been filed within six (6) months of the date said claim was denied.

III

That GEORGE MARTINEZ is the surviving father of MARY ELLEN MARTINEZ. PATRICIA MARTINEZ is the surviving mother of MARY ELLEN MARTINEZ. MICHELLE MARTINEZ is the surviving sister of MARY ELLEN MARTINEZ; MATTHEW MARTINEZ is the surviving brother of MARY ELLEN MARTINEZ and the Plaintiffs are the sole heirs at law of MARY ELLEN MARTINEZ, now deceased.

IV

That at all times herein mentioned, the Defendants, RAYMOND PROCUNIER, HENRY KERR, BERNARD FORMAN, CURTIS LYNUM, L. M. EDMAN, EDWARD BARLES and DOES I through L, Inclusive, were agents, servants and employees of the STATE OF CALIFORNIA, engaged in performing duties for the California Adult Authority and the California Department of Corrections.

V

That at all times herein mentioned, Defendant, THE STATE OF CALIFORNIA, was a sovereign state of the United States of America.

VI

That at all times herein mentioned, Plaintiffs were residents of the County of San Diego, State of California.

VII

That Plaintiffs are ignorant of the true names and capacities of Defendants stated herein as DOES I through L, inclusive, and Plaintiffs, therefore, sue these Defendants by such fictitious names and will amend this Complaint to show their true names when ascertained.

VIII

On August 1, 1975, MARY ELLEN MARTINEZ died in the County of San Diego, City of San Diego, State of California.

FIRST CAUSE OF ACTION

IX

Plaintiffs refer to paragraphs I, II, III, IV, VI, VII and VIII, inclusive, and by reference make them a part hereof.

X

That on December 12, 1969, one RICHARD JUNE-JORDAN THOMAS was found guilty of the attempted rape upon two (2) young females in an area known as Tecolote Canyon in the County of San Diego, State of California. That in the commission of the offense he caused the females' hands to be bound together and their mouths to be gagged, and did torture them while so bound and gagged.

XI

That subsequent to the conviction for the attack upon the two (2) females, RICHARD JUNE-JORDAN THOMAS was incarcerated in the STATE OF CALIFORNIA, in the institution known as Atascadero State Hospital, where he was examined by medical personnel and declared to be a Mentally Disordered Sex Offender not amenable to treated (*sic*).

XII

That RICHARD JUNE-JORDAN THOMAS was thereafter sentenced by the Superior Court in and for the County of San Diego to one to twenty (1-20) years in the State Prison system. The Court specifically expressed the view that parole should not be granted to this sex offender.

XIII

That after being within the STATE OF CALIFORNIA Prison System for approximately five (5) years without any current psychiatric evaluation, RICHARD JUNE-JORDAN THOMAS came before the Defendants, and each of them, requesting that he be paroled. That the Defendants, and each of them, had the duty to exercise reasonable care and discretion in determining when and if prisoners should be paroled to society.

XIV

That Defendants, and each of them, with knowledge that RICHARD JUNE-JORDAN THOMAS had attacked, tortured, bound and gagged two (2) females while he attempted to sexually violate them, had been examined medically and declared to be a Mentally Disordered Sex Offender, had been medically declared untreatable, had been sentenced to prison for one to twenty (1-20) years with a recommendation of no parole by the Superior Court of the County of San Diego, had received no psychiatric treatment of any kind for his sexual lust, had expressed an animosity and resentment towards his mother, had received no psychiatric evaluation within thirty (30) days of his request, did on March 10, 1975, release said RICHARD JUNE-JORDAN THOMAS to the care of his mother in the County of San Diego to be supervised by a "Parole Out-Patient Clinic."

XV

That the Defendants, and each of them, in so negligently permitting the release of said RICHARD JUNE-JORDAN THOMAS as above described, were not in possession of any facts upon which any person would or could exercise any

judgment, discretion or control by which a release could be permitted. Such conduct in releasing RICHARD JUNE-JORDAN THOMAS was outside the scope and course of their employment and not within the purview of either the California Adult Authority or the California Department of Corrections.

XVI

That subsequent to the release of RICHARD JUNE-JORDAN THOMAS as aforesaid and on August 1, 1975, in Tecolote Canyon in the County of San Diego, State of California, a female known as MARY ELLEN MARTINEZ was caught by RICHARD JUNE-JORDAN THOMAS, bound, gagged, tortured and killed in a sexual repetition of his depraved personality.

XVII

That as a direct and proximate result of the above described negligent conduct of the Defendants, and each of them, Plaintiffs have been deprived of the care, comfort, support, protection and society of MARY ELLEN MARTINEZ and will be so deprived in the future in the sum of One Million Dollars ($1,000,000.00).

SECOND CAUSE OF ACTION

XVIII

Plaintiffs refer to paragraphs I through IV, and VI through VIII; and paragraphs X through XIV, XVI and XVII of the First Cause of Action, inclusive, and by reference make them a part hereof.

XIX

That Defendants, and each of them, in permitting the ministerial act of release of RICHARD JUNE-JORDAN THOMAS as aforementioned, failed to comply with the requisite formalities upon which paroles must be granted pursuant to the administrative procedures of the California Adult Authority and California Department of Corrections in exercising their discretionary authority and were guilty of careless and reckless conduct.

XX

That the Defendants, and each of them, had a duty and obligation to comply with the California Penal Code in order to compile facts and data upon which a parole could be properly predicated and such discretionary conduct was a prerequisite to any ministerial act of release.

THIRD CAUSE OF ACTION

XXI

Plaintiffs refer to paragraphs I through IV, and VI through VIII; paragraphs X through XIV, XVI and XVII of the First Cause of Action; and paragraphs XIX and XX of the Second Cause of Action, inclusive, and by reference make them a part hereof.

XXII

That the Defendants, and each of them, knew, or in the exercise of ordinary care should have known that RICHARD JUNE-JORDAN THOMAS was a male person who had a propensity for engaging in cruel and sexual attacks upon

females and as such constituted a clear and present threat and danger to females who would commonly be in the area known as Tecolote Canyon in the County of San Diego, State of California.

XXIII

That the Defendants, and each of them, knew, or in the exercise of ordinary care should have known that young females commonly used the area known as Tecolote Canyon in the County of San Diego, State of California, and that said females were without protection from attack and molestation by males.

XXIV

That the Defendants, and each of them, knew, or should have known that the area known as Tecolote Canyon in the County of San Diego, State of California, was filled with ravines, gulches, patches of mesquite and underbrush that have previously been used by RICHARD JUNE-JORDAN THOMAS to commit his depraved and lustful acts of violence upon females.

XXV

That the Defendants, and each of them, did carelessly and negligently allow and permit RICHARD JUNE-JORDAN THOMAS access to the area known as Tecolote Canyon without warning females using the area of his presence or propensities to commit rape and attacks upon them. That said failure to warn permitted females to use the area when they ordinarily would not do so.

XXVI

That as a direct and proximate result of the above-described carelessness and negligence, MARY ELLEN MARTINEZ was killed as aforesaid.

FOURTH CAUSE OF ACTION

XXVII

Plaintiffs refer to paragraphs I through IV, and VI through VIII; paragraphs X through XIV, XVI and XVII of the First Cause of Action; paragraphs XIX and XX of the Second Cause of Action; and paragraphs XXII through XXVI of the Third Cause of Action, inclusive, and by reference make them a part hereof.

XXVIII

That Defendants, and each of them, willfully, wantonly, and maliciously failed to supervise RICHARD JUNE-JORDAN THOMAS and unreasonably exposed MARY ELLEN MARTINEZ to the risk of violent bodily harm and death.

XXIX

That as a result of said willful and wanton conduct, Plaintiffs are entitled to punitive damages to ensure that such conduct will not be practiced in the future in the sum of One Million Dollars ($1,000,000.00).

FIFTH CAUSE OF ACTION

XXX

Plaintiffs refer to paragraphs I through IV, and VI through VIII; paragraphs X through XVII of the First Cause of Action; paragraphs XIX and XX of the Second Cause of Action; paragraphs XXII through XXVI of the Third Cause of Action; and paragraphs XXVII through XXIX of the Fourth Cause of Action, inclusive, and by reference make them a part hereof.

XXXI

That this action arises under Title 42 of the U.S.C. §1983.

XXXII

That at all times herein mentioned, the Defendants, and each of them, were acting under color of State law, namely California Penal Code §§5075 and 5077.

XXXIII

That because of the recited facts as aforementioned, which said facts have been incorporated herein by reference, Plaintiffs have been deprived of the customs and usages of the rights and privileges of the STATE OF CALIFORNIA and secured by the Fifth and Fourteenth Amendments of the United States Constitution not to be deprived of life without due process.

XXXIV

That Plaintiffs allege that as the direct consequences and result of the acts of Defendants hereinbefore complained of, Plaintiffs have been deprived of the society, protection, services and support of Decedent, MARY ELLEN MARTINEZ.

XXXV

That as a result of being deprived of the right to life without due process of law, Plaintiffs are entitled to punitive damages to ensure that such conduct will not be practiced in the future in the sum of One Million Dollars ($1,000,000.00).

SIXTH CAUSE OF ACTION

XXXVI

Plaintiffs refer to paragraphs I through VIII, paragraphs X through XIV, XVI and XVII of the First Cause of Action; paragraphs XIX and XX of the Second Cause of Action; paragraphs XXII through XXVI of the Third Cause of Aciton; paragraphs XXVIII through XXIX of the Fourth Cause of Action; and paragraphs XXX through XXXV of the Fifth Cause of Action, inclusive, and by reference make them a part hereof.

XXXVII

That Defendant, STATE OF CALIFORNIA, subsequently learned of the unauthorized acts of its agents as alleged in the First Cause of Aciton. After having acquired such knowledge, said Defendant failed to take the necessary action to correct said acts, thereby ratifying and condoning said acts and, accordingly, acted in conjunction with the other Defendants as hereinafter alleged.

XXXVIII

That at all times mentioned herein, Defendants, and each of them, knew of the dangerous propensities of convicted felon, RICHARD JUNE-JORDAN THOMAS.

XXXIX

That Defendants, and each of them, were notified and were cognizant of said dangerous propensities both before the granting of parole and subsequent to the granting of parole by various psychiatrists, psychologists and other individuals.

XL

That Defendants, and each of them, having knowledge of the dangerous propensities of RICHARD JUNE-JORDAN THOMAS willfully and maliciously failed to correct the negligent paroling of said convicted felon which was outside the scope and course of their employment, and willfully and maliciously failed to supervise said convicted felon subsequent to the granting of parole; and by such willful failure, Defendants were unreasonably exposing MARY ELLEN MARTINEZ to probably (*sic*) serious harm.

XLI

That Defendants, and each of them, having knowledge of the dangerous propensities of RICHARD JUNE-JORDAN THOMAS, willfully and maliciously failed to warn females using the area known as Tecolote Canyon of his presence or propensities to commit rape and attacks upon them, and by such willful and malicious failure, Defendants were unreasonably exposing MARY ELLEN MARTINEZ to probable serious harm.

XLII

That Defendants, and each of them, having knowledge of the dangerious (*sic*) propensities of convicted felon, RICHARD

JUNE-JORDAN THOMAS, did in such reckless and wanton disregard of the possible consequences to Plaintiffs by reason thereof, unreasonably expose MARY ELLEN MARTINEZ to probable serious harm.

XLIII

That Defendants, and each of them, did the things hereinabove alleged willfully, maliciously and in reckless and wanton disregard of the possible consequences to Plaintiffs by reason thereof.

XLIV

That as a result of said conduct, Plaintiffs are entitled to punitive damages to ensure that such conduct will not be practiced in the future in the sum of One Million Dollars ($1,000,000.00).

WHEREFORE, Plaintiffs pray for judgment as follows:

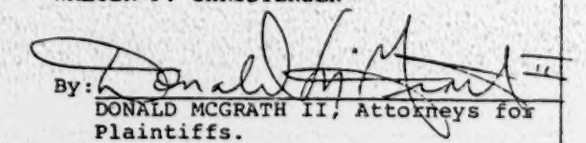
1. For damages in the sum of One Million Dollars ($1,000,000.00);
2. For punitive damages in the sum of One Million Dollars ($1,000,000.00);
3. For costs of suit herein incurred; and
4. For such other and further relief as the Court may deem proper.

DATED: May 25, 1976.

THOMPSON, BUNKER, SULLIVAN & MCGRATH
A Professional Corporation

In association with

WALTER P. CHRISTENSEN

By: 
DONALD MCGRATH II, Attorneys for Plaintiffs.

RECEIVED
JUL 08 1976
Thompson, Bunker, Coulter & McGrath
A Professional Corporation

EVELLE J. YOUNGER, Attorney General
JEFFREY T. MILLER,
Deputy Attorney General
110 West A Street, Suite 600
San Diego, California 92101
Telephone: (714) 236-7762

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFOKNIA

FOR THE COUNTY OF SAN DIEGO

GEORGE MARTINEZ, PATRICIA MARTINEZ, MICHELLE MARTINEZ by her Guardian Ad Litem GEORGE MARTINEZ, and MATTHEW MARTINEZ by his Guardian Ad Litem GEORGE MARTINEZ,

Plaintiffs,

v.

THE STATE OF CALIFORNIA, RAYMOND PROCUNIER, HENRY KERR, BERNARD FORMAN, CURTIS LYNUM, L.M. EDMAN, EDWARD BARLES, AND DOES I THROUGH L, INCLUSIVE,

Defendants.

No. 382460

NOTICE OF DEMURRER TO COMPLAINT; DEMURRER TO COMPLAINT; POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: July 21, 1976
Department 11
Time: 1:30 p.m.

TO: PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Wednesday, July 21, 1976, at 1:30 p.m., or as soon thereafter as counsel may be heard in Department 11 of the above entitled court, defendants State of

California, Raymond Procunier, Henry Kerr, Bernard Forman, Curtis Lynum, L.M. Edman and Edward Barles, and each of them, will demur to the Complaint For Damages For Wrongful Death And For Civil Rights Violation (hereinafter referred to as complaint) on the following ground:

DEMURRER TO COMPLAINT

Defendants demur to each and every cause of action of the complaint on the ground that neither the complaint nor any cause of action thereof sets forth facts sufficient to constitute a cause of action.

WHEREFORE, defendants hereby request that this demurrer be sustained without leave to amend and that defendants be awarded their costs of suit herein incurred.

Dated: June 28, 1976

Evelle J. Younger, Attorney General

Jeffrey T. Miller,
Deputy Attorney General

Attorneys for Defendants

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SEP 02 1976
Thompson, Sunset, Sullivan & McGrath
A Professional Corporation

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

GEORGE MARTINEZ, PATRICIA MARTINEZ, MICHELLE MARTINEZ by her Guardian Ad Litem GEORGE MARTINEZ, and MATTHEW MARTINEZ by his Guardian Ad Litem GEORGE MARTINEZ,

Plaintiffs,

vs.

THE STATE OF CALIFORNIA, RAYMOND PROCUNIER, HENRY KERR, BERNARD FORMAN, CURTIS LYNUM, L. M. EDMAN, EDWARD BARLES, and DOES I through L, Inclusive,

Defendants.

NO. 382460

MINUTE ORDER

Demurrers are sustained to causes of action 1, 2, 3, 4, 5 and 6. Leave to amend causes of action 1 and 6 is granted, but denied as to 2, 3, 4, and 5.

It is clear that a public employee is not liable for an injury resulting from his discretionary acts, even if the discretion is abused (as, for example, by failing to get needed psychological reports before acting) Government Code Section 820.2. Plaintiff's counsel seek to distinguish between discretionary and ministerial phases of the parole process. Such distinction was rejected in *State of California v. Superior Court (American Indemnity Company)*, 37 Cal. App. 3d 1023 (1974).

As to the allegations that all teenage girls in the "vicinity" of Tecolote Canyon had a right to be warned of the presence of a sex maniac, *American Indemnity Co. supra,* is also controlling. "The instant case, unlike *Johnson* does not involve a situation where, after there has been an actual release, there is a *continuing relationship* between the State *and some particular member of the public.*" (*Ibid* at 1027, first emphasis that of the Court, emphasis supplied to last seven words.)

This Court does not find that the use of the word "determining" so distinguishes Government Code Section 845.8(a) from subsection (b) as to make *County of Sacramento v. Superior Court,* 8 Cal. 3d 479 inapplicable. In *Webster's Third International Dictionary,* Unabridged 1971 Edition, the first definition of "determine" is ". . . to fix conclusively or authoritatively," the second definition is ". . . to settle a question or controversy. . ." and the third is ". . . to come to a decision concerning *as the result of investigation or reasoning* . . ." Only if the third definition is applied should we conclude that "determining" means to use discretion.

The Federal Civil Rights Act, 42 USC § 1983 provides wrongful death benefits ". . .if such is permitted by state law." (Plaintiff's Memorandum of Points and Authorities, p. 15) Since this Court concludes that State law does not permit this action, none accrues under federal law.

Finally, the allegations of causes of action 1 and 6 are contradictory and conflicting as to their meaning. Paragraph IV, incorporated into the first and sixth causes of action, alleges that the individual defendants were State agents, at all times *engaged* in performing duties for the State. Paragraph XIV alleges that defendants and each of them (*e.g.* the State) knew

the assassin had not been psychologically evaluated *before* he was released; Paragraph XV alleges that "their" (without definition) conduct was outside the scope of their employment and in the sixth cause of action, Paragraph XV is not incorporated.

DATED: 1 SEP 1976.

JUDGE OF THE SUPERIOR COURT

DONALD McGRATH II, ESQ.
THOMPSON, BUNKER, SULLIVAN & McGRATH
A Professional Corporation
1405 Security Pacific Plaza
San Diego, California 92101
Telephone: (714) 234-6781

In Association With

WALTER P. CHRISTENSEN, ESQ.
Attorney at Law
Fifth Avenue Financial Centre
2550 Fifth Avenue, Suite 515
San Diego, California 92103
Telephone: (714) 232-8971

Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

GEORGE MARTINEZ, PATRICIA MARTINEZ, MICHELLE MARTINEZ, by her Guardian ad Litem, GEORGE MARTINEZ, and MATTHEW MARTINEZ, by his Guardian ad Litem, GEORGE MARTINEZ, Plaintiffs, vs. THE STATE OF CALIFORNIA, RAYMOND PROCUNIER, HENRY KERR, BERNARD FORMAN, CURTIS LYNUM, L. M. EDMAN, EDWARD BARLES, and DOES I through L, Inclusive, Defendants.	NO. 382460 FIRST AMENDED COMPLAINT FOR DAMAGES FOR WRONGFUL DEATH AND FOR CIVIL RIGHTS VIOLATION

Come now the Plaintiffs and with leave of Court files their First Amended Complaint For Damages by amending the First Cause of Action and the Sixth Cause of Action and repleading in full Causes of Action Second, Third, Fourth and Fifth.

I

That plaintiff, MICHELLE MARTINEZ, age 15, and Plaintiff, MATTHEW MARTINEZ, age 13, are minors and by Order of the above-entitled Court duly given and made on May 25, 1976, Plaintiff, GEORGE MARTINEZ, was duly appointed Guardian ad Litem of said minors for the purposes of bringing this action and ever since has been, and still is, the duly appointed acting Guardian ad Litem of said minors.

II

That prior to the commencement of this action and on November 7, 1975, Plaintiffs filed a claim for damages with the State Board of Control. That said claim was denied on December 23, 1975. That said claim was filed within one hundred (100) days of the death of MARY ELLEN MARTINEZ on August 1, 1975. That this action has been filed within six (6) months of the date said claim was denied.

III

That GEORGE MARTINEZ is the surviving father of MARY ELLEN MARTINEZ. PATRICIA MARTINEZ is the surviving mother of MARY ELLEN MARTINEZ. MICHELLE MARTINEZ is the surviving sister of MARY ELLEN MARTINEZ; MATTHEW MARTINEZ is the surviving brother of MARY ELLEN MARTINEZ and the Plaintiffs are the sole heirs at law of MARY ELLEN MARTINEZ, now deceased.

IV

That at all times herein mentioned, the Defendants, RAYMOND PROCUNIER, HENRY KERR, BERNARD FORMAN, CURTIS LYNUM, L. M. EDMAN, EDWARD BARLES and DOES 1 through L, Inclusive, were agents, servants and employees of the STATE OF CALIFORNIA, engaged in performing duties for the California Adult Authority and the California Department of Corrections.

V

That at all times herein mentioned, Defendant, THE STATE OF CALIFORNIA, was a sovereign state of the United States of America.

VI

That at all times herein mentioned, Plaintiffs were residents of the County of San Diego, State of California.

VII

That Plaintiffs are ignorant of the true names and capacities of Defendants stated herein as DOES 1 through L, inclusive, and Plaintiffs, therefore, sue these Defendants by such fictitious names and will amend this Complaint to show their true names when ascertained.

VIII

On August 1, 1975, MARY ELLEN MARTINEZ died in the County of San Diego, City of San Diego, State of California.

FIRST CAUSE OF ACTION

IX

Plaintiffs refer to Paragraphs I, II, III, VI, VII and VIII, inclusive, and by reference make them a part hereof.

X

That on December 12, 1969, one RICHARD JUNE-JORDAN THOMAS was found guilty of the attempted rape upon two (2) young females in an area known as Tecolote Canyon in the County of San Diego, State of California. That in the commission of the offense he caused the females' hands to be bound together and their mouths to gagged, and did tortue them while so bound and gagged.

XI

That subsequent to the conviction for the attack upon the two (2) females, RICHARD JUNE-JORDAN THOMAS was incarcerated in the STATE OF CALIFORNIA, in the institution known as Atascadero State Hospital, where he was examined by medical personnel and declared to be a Mentally Disordered Sex Offender not amenable to treatment.

XII

That RICHARD JUNE-JORDAN THOMAS was thereafter sentenced by the Superior Court in and for the County of San Diego to one to twenty (1-20) years in the State Prison System. The Court specifically expressed the view that parole should not be granted to this sex offender.

XIII

That after being within the STATE OF CALIFORNIA Prison System for approximately five (5) years without any current psychiatric evaluation, RICHARD JUNE-JORDAN THOMAS came before the Defendants, and each of them, requesting that he be paroled. That the Defendants, and each of them, had the duty to exercise reasonable care and discretion in determining when and if prisoners should be paroled to society.

XIV

That the individually named defendants, with knowledge that RICHARD JUNE-JORDAN THOMAS had attacked, tortured, bound and gagged two (2) females while he attempted to sexually violate them, had been examined medically and declared to be a Mentally Disordered Sex Offender, had been medically declared untreatable, had been sentenced to prison for one to twenty (1-20) years with a recommendation of no parole by the Superior Court of the County of San Diego, had received no psychiatric treatment of any kind for his sexual lust, had expressed an animosity and resentment towards his mother, had received no psychiatric evaluation within thirty (30) days of his request, did on March 10, 1975, release said RICHARD JUNE-JORDAN THOMAS to the care of his mother in the County of San Diego to be supervised by a "Parole Out-Patient Clinic".

XV

That the individually named defendants' conduct was tortious in permitting the release of said RICHARD JUNE-JORDAN THOMAS because of the knowledge of the facts and circumstances set forth in Paragraph XIV of this Complaint. That no

reasonable and prudent person would or could be able to exercise any discretion or judgment or make any determination to release or parole such a person. That the exercise of discretion and judgment can only be performed while an individual is acting within the course and scope of his employment. The release of this assasin under circumstances where reasonable and prudent men could not and would not release him constitutes conduct that is outside the course and scope of these individual defendants' duties and is not within the purview of any conduct that would or could be anticipated by the California Adult Authority or the California Department of Corrections.

XVI

That subsequent to the release of RICHARD JUNE-JORDAN THOMAS as aforesaid and on August 1, 1975, in Tecolote Canyon in the County of San Diego, State of California, a female known as MARY ELLEN MARTINEZ was caught by RICHARD JUNE-JORDAN THOMAS, bound, gagged, tortured and killed in a sexual repetition of his depraved personality.

XVII

That as a direct and proximate result of the above described negligent conduct of the Defendants, and each of them, Plaintiffs have been deprived of the care, comfort, support, protection and society of MARY ELLEN MARTINEZ and will be so deprived in the future in the sum of One Million Dollars ($1,000,000.00).

SECOND CAUSE OF ACTION

XVIII

Plaintiffs refer to paragraphs I through IV, and VI through VIII; and paragraphs X through XIV, XVI and XVII of the First Cause of Action, inclusive, and by reference make them a part hereof.

XIX

That Defendants, and each of them, in permitting the ministerial act of release of RICHARD JUNE-JORDAN THOMAS as aforementioned, failed to comply with the requisite formalities upon which paroles must be granted pursuant to the administrative procedures of the California Adult Authority and California Department of Corrections in exercising their discretionary authority and were guilty of careless and reckless conduct.

XX

That the Defendants, and each of them, had a duty and obligation to comply with the California Penal Code in order to compile facts and date upon which a parole could be properly predicated and such discretionary conduct was a prerequisite to any ministerial act of release.

THIRD CAUSE OF ACTION

XXI

Plaintiffs refer to Paragraphs I through IV, and VI through VIII; Paragraphs X through XIV, XVI and XVII of the First Cause of Action; and Paragraphs XIX and XX of the Second

Cause of Action, inclusive, and by reference make them a part hereof.

XXII

That the Defendants, and each of them, knew, or in the exercise of ordinary care should have known that RICHARD JUNE-JORDAN THOMAS was a male person who had a propensity for engaging in cruel and sexual attacks upon females and as such constituted a clear and present threat and danger to females who would commonly be in the area known as Tecolote Canyon in the County of San Diego, State of California.

XXIII

That the Defendants, and each of them, knew, or in the exercise of ordinary care should have known that young females commonly used the area known as Tecolote Canyon in the County of San Diego, State of California, and that said females were without protection from attack and molestation by males.

XXIV

That the Defendants, and each of them, knew, or should have known that the area known as Tecolote Canyon in the County of San Diego, State of California, was filled with ravines, gulches, patches of mesquite and underbrush and have previously been used by RICHARD JUNE-JORDAN THOMAS to commit his depraved and lustful acts of violence upon females.

XXV

That the Defendants, and each of them, did carelessly and negligently allow and permit RICHARD JUNE-JORDAN THOMAS access to the area known as Tecolote Canyon without warning females using the area of his presence or propensities to commit rape and attacks upon them. That said failure to warn permitted females to use the area when they ordinarily would not do so.

XXVI

That as a direct and proximate result of the above-described carelessness and negligence, MARY ELLEN MARTINEZ was killed as aforesaid.

FOURTH CAUSE OF ACTION

XXVII

Plaintiffs refer to Paragraphs I through IV, and VI through VIII; Paragraphs X through XIV, XVI and XVII of the First Cause of Action; Paragraphs XIX and XX of the Second Cause of Action; and Paragraphs XXII through XXVI of the Third Cause of Action, inclusive, and by reference make them a part hereof.

XXVIII

That Defendants, and each of them, wilfully, wantonly, and maliciously failed to supervise RICHARD JUNE-JORDAN THOMAS and unreasonably exposed MARY ELLEN MARTINEZ to the risk of violent bodily harm and death.

XXIX

That as a result of the wilful and wanton conduct, Plaintiffs are entitled to punitive damages to ensure that such conduct will not be practiced in the future in the sum of One Million Dollars ($1,000,000.00).

FIFTH CAUSE OF ACTION

XXX

Plaintiffs refer to Paragraphs I through IV, and VI through VIII; Paragraphs X through XVII of the First Cause of Action; Paragraphs XIX and XX of the Second Cause of Action; Paragraphs XXII through XXVI of the Third Cause of Action; and Paragraphs XXVII through XXIX of the Fourth Cause of Action, inclusive, and by reference make them a part hereof.

XXXI

That this action arises under Title 42 of the U.S.C. §1983.

XXXII

That at all times herein mentioned, the Defendants, and each of them, were acting under color of State Law, namely, California Penal Code §§5075 and 5077.

XXXIII

That because of the recited facts as aforementioned, which said facts have been incorporated herein by reference, Plaintiffs have been deprived of the customs and usages of the rights and privileges of the STATE OF CALIFORNIA and secured by the Fifth and Fourteenth Amendments of the United States Constitution not to be deprived of life without due process.

XXXIV

That Plaintiffs allege that as the direct consequences and result of the acts of Defendants hereinbefore complained of, Plaintiffs have been deprived of the society, protection, services and support of Decedent, MARY ELLEN MARTINEZ.

XXXV

That as a result of being deprived of the right to life without due process of law, Plaintiffs are entitled to punitive damages to ensure that such conduct will not be practiced in the future in the sum of One Million Dollars ($1,000,000.00).

SIXTH CAUSE OF ACTION

XXXVI

Plaintiffs refer to Paragraphs I, II, III, V, VI, VII and VIII. Paragraphs X through XVII of the First Cause of Action; Paragraphs XIX and XX of the Second Cause of Action; Paragraphs XXII through XXVI of the Third Cause of Action; Paragraphs XXVIII through XXIX of the Fourth Cause of Action; and Paragraphs XXX through XXXV of the Fifth Cause of Action, inclusive, and by reference make them a part hereof.

XXXVII

That Defendant, STATE OF CALIFORNIA, subsequently learned of the unauthorized acts of its agents as alleged in the First Cause of Action. After having acquired such knowledge, said Defendant failed to take the necessary action to correct said acts, thereby ratifying and condoning said acts and,

accordingly, acted in conjunction with the other Defendants as hereinafter alleged.

XXXVIII

That at all times mentioned herein, Defendants, and each of them, knew of the dangerous propensities of convicted felon, RICHARD JUNE-JORDAN THOMAS.

XXXIX

That Defendants, and each of them, were notified and were cognizant of said dangerous propensities both before the granting of the parole and subsequent to the granting of parole by various psychiatrists, psychologists and other individuals.

XL

That Defendants, and each of them, having knowledge of the dangerous propensities of RICHARD JUNE-JORDAN THOMAS wilfully and maliciously failed to correct the negligent paroling of said convicted felon which was outside the scope and course of their employment, and wilfully and maliciously failed to supervise said convicted felon subsequent to the granting of parole; and by such wilful failure, Defendants were unreasonably exposing MARY ELLEN MARTINEZ to probably (*sic*) serious harm.

XLI

That Defendants, and each of them, having knowledge of the dangerous propensities of RICHARD JUNE-JORDAN THOMAS, wilfully and maliciously failed to warn females using the area known as Tecolote Canyon of his presence or propensitites (*sic*) to commit rape and attacks upon them, and by such wilful and malicious failure, Defendants were

unreasonably exposing MARY ELLEN MARTINEZ to probable serious harm.

XLII

That Defendants, and each of them, having knowledge of the dangerous propensities of convicted felon, RICHARD JUNE-JORDAN THOMAS, did in such reckless and wanton disregard of the possible consequences to Plaintiffs by reason thereof, unreasonably expose MARY ELLEN MARTINEZ to probable serious harm.

XLIII

That Defendants, and each of them, did the things hereinabove alleged wilfully, maliciously and in reckless and wanton disregard of the possible consequences to Plaintiffs by reason thereof.

XLIV

That as a result of said conduct, Plaintiffs are entitled to punitive damages to ensure that such conduct will not be practiced in the future in the sum of One Million Dollars ($1,000,000.00).

WHEREFORE, Plaintiffs pray for judgment as follows:

1. For damages in the sum of One Million Dollars ($1,000,000.00);
2. For punitive damages in the sum of One Million Dollars ($1,000,000.00);
3. For costs of suit herein incurred; and

4. Such such (*sic*) other and further relief as the Court may deem proper.

DATED: September 14, 1976.

WALTER P. CHRISTENSEN

Walter P. Christensen

In Association With

DONALD McGRATH II
THOMPSON, BUNKER, SULLIVAN & McGRATH
A Professional Corporation

Attorneys for Plaintiffs

EVELLE J. YOUNGER, Attorney General
JEFFREY T. MILLER,
Deputy Attorney General
110 West A Street, Suite 600
San Diego, California 92101
Telephone: (714) 236-7762

Attorneys for Defendants

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Thompson, Bunker, Sullivan & McGrath
A Professional Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

GEORGE MARTINEZ, et al., Plaintiffs, v. THE STATE OF CALIFORNIA, et al., Defendants.	No. 382460 NOTICE OF DEMURRER TO FIRST AMENDED COMPLAINT; DEMURRER TO FIRST AMENDED COMPLAINT; POINTS AND AUTHORITIES IN SUPPORT THEREOF Date: November 8, 1976 Time: 1:30 p.m. Department 11

TO: PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Monday, November 8, 1976, at 1:30 p.m., or as soon thereafter as counsel may be heard in Department 11 of the above entitled Court, defendants State of California, Raymond Procunier, Henry Kerr, Bernard Formun, Curtis Lynum, L.M. Edman and Edward Barles, and each of them, will demur to the First Amended Complaint For Damages For Wrongful Death And For Civil Rights Violation (hereinafter referred to as first amended complaint) on the following ground:

DEMURRER TO FIRST AND SIXTH CAUSES OF ACTION OF THE FIRST AMENDED COMPLAINT

Defendants demur to the First and Sixth Causes of Action of the first amended complaint on the grounds that neither of those two causes of action sets forth facts sufficient to constitute a cause of action.

WHEREFORE, defendants hereby request that this demurrer be sustained without leave to amend and that defendants be awarded their costs of suit herein incurred.

Dated: October 13, 1976.

Evelle J. Younger, Attorney General

Jeffrey T. Miller,
Deputy Attorney General

Attorneys for Defendants

EVELLE J. YOUNGER, Attorney General
JEFFREY T. MILLER,
Deputy Attorney General
110 West A Street, Suite 600
San Diego, California 92101
Telephone: (714) 236-7762

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

GEORGE MARTINEZ, et al., Plaintiffs, v. THE STATE OF CALIFORNIA, et al., Defendants.	No. 382460 ORDER SUSTAINING DEMURRERS AND JUDGMENT OF DISMISSAL THEREON

On August 26, 1976, the demurrer of defendants State of California, Raymond Procunier, Henry Kerr, Bernard Formun, Curtis Lynum, L.M. Edman and Edward Barles came on regularly for hearing before the Honorable Louis M. Welsh, Judge Presiding. Plaintiffs appeared through Thompson, Sullivan, McGrath & McDonald by Donald McGrath II, in association with Walter P. Christensen. Defendants appeared through Evelle J. Younger, Attorney General of the State of California by Jeffrey T. Miller, Deputy Attorney General of the State of California. The matter was argued and submitted on the basis of said argument and written points and authorities

submitted by all parties. The demurrer of said defendants was sustained without leave to amend with respect to the Second, Third, Fourth and Fifth Causes of Action, and sustained with leave to amend with respect to the First and Sixth Causes of Action.

On November 8, 1976, the demurrer of defendants State of California, Raymond Procunier, Henry Kerr, Bernard Formun, Curtis Lynum, L.M. Edman and Edward Barles as to the First and Sixth Causes of Action, as amended, was heard before the Honorable Douglas R. Woodworth, Judge Presiding. Plaintiffs appeared through Thompson, Sullivan, McGrath & McDonald by Donald McGrath II, in association with Walter P. Christensen. Defendants appeared through Evelle J. Younger, Attorney General of the State of California by Jeffrey T. Miller, Deputy Attorney General of the State of California. Written points and authorities were filed by all parties and the matter was argued on behalf of all parties.

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the demurrers of defendants State of California, Raymond Procunier, Henry Kerr, Bernard Formun, Curtis Lynum, L.M. Edman and Edward Barles are sustained without leave to amend as to the Second, Third, Fourth and Fifth Causes of Action of the Complaint For Damages For Wrongful Death And For Civil Rights Violation, and without leave to amend as to the First and Sixth Causes of Action of the First Amended Complaint For Damages For Wrongful Death And For Civil Rights Violation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above entitled action be dismissed, with prejudice, and is hereby so dismissed.

Dated:_____

IT IS SO ORDERED _____ JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM AND CONTENT

THOMPSON, SULLIVAN, McGRATH & McDONALD
by DONALD McGRATH II

in association with

WALTER P. CHRISTENSEN

15
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by:

DONALD McGRATH II

COURT OF APPEAL - FOURTH DIST.
FILED
SEP 22 1978
ROBERT L. FORD, Clerk
DEPUTY CLERK

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GEORGE MARTINEZ, et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA, et al., Defendants and Respondents.	4 Civ. No. 16386 (Superior Court No. 382460)

APPEAL from a judgment of the Superior Court of San Diego County. Louis M. Welsh and Douglas R. Woodworth, Judges. Affirmed.

George Martinez appeals the judgment following an order sustaining State's demurrer without leave to amend.

Richard June-Jordan Thomas was convicted on December 12, 1969 of attempted forcible rape. He was sent to Atascadero State Hospital for six months where he was designated a "Mentally Disordered Sex Offender" (MDSO), not amenable to treatment. He was sentenced to prison for from six months to 20 years in April 1970 and was paroled five years later on condition he appear regularly at a "parole out-patient clinic." Five months after his release Thomas kidnapped and murdered Mary Ellen Martinez, a 15 year old.

George Martinez filed suit for his daughter's wrongful death and for civil rights violations in six causes of action alleging

defendants were negligent in releasing Thomas, failed to supervise Thomas properly while he was on parole, violated the Federal Civil Rights Act[1]/ and failed to warn females Thomas was loose. He sought compensatory and punitive damages. We consider each cause of action in turn.

The first cause of action alleged the defendants were employed by the California Department of Corrections and the Adult Authority, had a duty to be reasonably careful in paroling prisoners and had breached that duty because no prudent, reasonable person knowing Thomas' history would have released him. Martinez says governmental immunity provided by Government Code section 845.8(a)[2]/ does not apply because the employees here were acting outside the course and scope of their employment. However, even if these employees abused their discretion by granting parole knowing Thomas had tortured two girls in attempting to rape them, was an untreatable MDSO with a recommendation of no parole, had

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FOOTNOTE 1: 42 U.S.C.A. §1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

FOOTNOTE 2: This statute states: "Neither a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release. (b) Any injury caused by: (1) An escaping or escaped prisoner; (2) An escaping or escaped arrested person; or (3) A person resisting arrest."

received no psychiatric treatment during his incarceration and had no psychiatric evaluation after his request this does not make them liable. The statute by its own terms releases an employee from any liability stemming from the exercise of his discretion in determining whether a prisoner should be released (see Gov. Code §820.2; see *State of California v. Superior Court*, 37 Cal. App. 3d 1023, 1026).

As for the charge these employees were not acting within the scope of their employment, there are no allegations they were doing anything other than what they were hired to do, that is, determine when prisoners are to be paroled (*Burgdorf v. Funder*, 246 Cal. App. 2d 443, 448).

In his second cause of action Martinez says the State's employees were negligent in "performing ministerial acts of release." He claims Government Code section 845.8(b) grants employees absolute immunity for discretionary and ministerial acts when dealing with escapees, while section 845.8(a) covers only those injuries flowing from "determinations" about parole (see fn. 2; *County of Sacramento v. Superior Court*, 8 Cal. 3d 479). In short, he says section 845.8(a) confers discretionary immunity but not absolute immunity. In making a decision to release a prisoner the actual decision, including the ministerial act of applying established rules and regulations to the particular case in question, is covered by governmental immunity (*State of California v. Superior Court, supra*, 37 Cal. App. 3d 1023, 1027-1028). Not covered are ministerial acts in carrying out the decision to release the person, and an allegation of negligence must be determined on a case-by-case basis (*Johnson v. State of California*, 69 Cal. 2d 782, 797; see *Morgan v. County of Yuba*, 230 Cal. App. 2d 938, 942). In this count Martinez does not allege negligence occuring after the decision

to release Thomas. The complaint, by reference, incorporates allegations from the first count that: the employees knew Thomas had tortured the girls during the attempted rapes; he had been declared an untreatable MDSO; it had been recommended he not be paroled; he had received no psychiatric treatment; and, had no psychiatric evaluation within 30 days of his request. All of these acts or omissions are part of the discretionary act of releasing a prisoner and come within the government's immunity.

In his third cause of action Martinez says the State was negligent in failing to warn females using Tecolote Canyon of the danger now that Thomas was released. At oral argument he agreed this count should be dismissed because there was no continuing relationship between the State and the victim (*Whitcombe v. County of Yolo*, 73 Cal. App. 3d 698, 713; *Anderson v. State of California*, 83 Cal. App. 3d 188, 196).

In his fourth cause of action Martinez claims the State wantonly, wilfully and maliciously failed to supervise Thomas. The decision on what conditions to impose upon a parolee including, for example, the imposition of a certain amount of supervision is part of the determination in section 845.8(a) which is immune from liability. However, supervision of a parolee consists of the "ministerial implementation of correctional programs which can hardly . . . be isolated from discretionary judgments in adopting such programs." (See *County of Sacramento v. Superior Court, supra*, 8 Cal. 3d 479, 485). Thus, for correctional activities, both discretionary decisions and their ministerial implementation come under the blanket of immunity (*Whitcombe v. County of Yolo, supra*, 73 Cal. App. 3d 698, 714) and Martinez has not stated a cause of action.

Martinez's fifth cause of action alleges violation of the Federal Civil Rights Act (see fn. 1), saying the acts of the individual respondents under Penal Code sections 5075 and 5077[3]/ caused and deprived Mary Ellen of her life and liberty. He points out that governmental immunity is not an absolute bar to such a suit (*Kletschka v. Driver*, 411 F. 2d 436, 448). However, official acts are privileged if they were done within the scope of their official duties (*Ahlstrand v. Lethert*, 319 F. Supp. 283, 284). As members of the Adult Authority, they are performing quasi-judicial functions when they make determinations regarding parole and are immune from suit under the Civil Rights Act (*Fitzgerald v. Procunier*, 393 F. Supp. 335, 343).

Martinez claims Mary Ellen's death resulted from actions and omissions above and beyond the actual processing of applications for parole, such as the failure to warn, and the failure to supervise Thomas. In addition, he argues that public policy considerations support the application of a restricted immunity with regard to civil rights actions brought by injured citizens. We weigh his arguments propounding liability against the local rule of immunity (*Kletschka v. Driver, supra*, 411 F. 2d 436, 448). The factors Martinez cites against absolute immunity are: an official who acts maliciously should be liable; it may not be in the public's interest always to have an official execute his duties with the utmost zeal; other social values, for example, the right to life and physical safety, may be more important than

FOOTNOTE 3: Section 5075 concerns the members, appointment, term, vacancies and qualifications of persons on the Adult Authority while section 5077 deals with granting and revoking of parole by the Adult Authority.

immunity; and indemnity by the State reduces the consequences of the liability of public officials. However, there are no facts here to show malice. Thomas was eligible for parole; the members of the Adult Authority determined he was ready for it. There is no sure formula for the members to know when a convict is rehabilitated and ready to reenter society. Yet it is important for the well-being of both society and the individual, to release persons as soon as they are rehabilitated. It is to society's advantage to try a variety of rehabilitative efforts and to use the maximum flexibility in facilitating the individual's reentry into society. In order to accomplish these aims it is necessary for public officials to make these decisions without fear they will be liable if they are wrong (see *Whitcombe v. County of Yolo, supra*, 73 Cal. App. 3d 698, 710, fn. 11, 716). There is no liability for these injuries as pleaded under the Civil Rights Act.

In his sixth cause of action Martinez charges the State was negligent in failing to revoke Thomas' parole, supervise him properly and warn young females after it learned of its agents' unauthorized acts in releasing him. Since the acts of its employees are covered by governmental immunity, as discussed earlier, the State is not liable.

Martinez says the statute, Government Code section 845.8(a), is unconstitutional because it permits the deprivation of life, a fundamental right, without due process. He suggests the statute, if it confers absolute immunity, encouraged the actions resulting in Mary Ellen's death and, thus, requires a compelling state interest. However, the Legislature has broad powers to control governmental tort liability limited only by the rule it not act arbitrarily (*Reed v. City & County of San Francisco*, 237 Cal. App. 2d 23, 24). The California Tort Claims Act as a whole

(Gov. Code §§810 et seq.) has been found constitutional (*Datil v. City of Los Angeles*, 263 Cal. App. 2d 655, 660-661). The stated purpose of section 845.8(a) is to allow correctional personnel to make determinations of release or parole unfettered by any fear of tort liability (Law Rev. Com. Comment). To impose tort liability would have a chilling effect on the decision making process, impede implementation of trial release programs and prolong incarceration unjustifiably for many prisoners. There is a rational relationship between the State's purposes and the statute.

Martinez says the trial court abused its discretion in sustaining the demurrers without leave to amend. However, leave to amend is properly denied when the facts are not in dispute, the nature of the claim is clear but there is no liability under substantive law (*Sackett v. Wyatt*, 32 Cal. App. 3d 592, 603). Here the only questions were legal ones: whether the immunity of Government Code section 845.8(a) applied, whether *Johnson v. State of California, supra*, 69 Cal. 2d 782, 797) applied, whether the Federal Civil Rights Act applied and whether the statute was constitutional. Under the facts as stated there is no liability here and it would be futile to permit further amendment.

The judgment is affirmed.

Brown
P.J.

WE CONCUR:

Regan
J.

Whiener
J.

COURT OF APPEAL - FOURTH DIST.
FILED
OCT 12 1978
ROBERT L. FORD, Clerk
W. Deeton
DEPUTY CLERK

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GEORGE MARTINEZ, et al., Plaintiffs and Appellants, v. THE STATE OF CALIFORNIA, et al., Defendants and Respondents.	4 Civ. No. 16386 (Superior Court No. 382460)

[Modification of Opinion.]

THE COURT:

The opinion in the above entitled matter filed on September 22, 1978 is modified as follows:

Starting with page 5, line 6, delete:

> "*Anderson v. State of California*, 83 Cal. App. 3d 188, 196"; and on the same page, second paragraph, line 7, the word "which" in the quote should be in brackets as it is a substitution for the word "however," so the quote reads: "ministerial implementation of correctional programs [which] can hardly . . ."

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

NOV 15 1978

I have this day filed Order

HEARING DENIED

In re: 4 Civ. *No.* 16386

Martinez

vs.

State of California

Respectfully,

G. E. BISHEL
Clerk

93421-877 8-78 4M OSP

Supreme Court, U. S.
FILED
APR 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1268

GEORGE MARTINEZ, et al.,

Appellants,

vs.

THE STATE OF CALIFORNIA, et al.,

Appellees.

ON APPEAL FROM THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION ONE

MOTION TO DISMISS OR AFFIRM

GEORGE DEUKMEJIAN,
Attorney General
ANTHONY M. SUMMERS,
JEFFREY T. MILLER,
Deputy Attorneys General
110 West "A" Street, Suite 600
San Diego, California 92101
Telephone: (714) 237-7762

Attorneys for Appellees

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1268

GEORGE MARTINEZ, et al.,
Appellants,

vs.

THE STATE OF CALIFORNIA, et al.,
Appellees.

MOTION TO DISMISS OR AFFIRM

On appeal from the Court of Appeal of the State of California, Fourth Appellate District, Division One

Pursuant to United States Supreme Court Rule 16, appellees, State of California, et al., hereby move this Court to dismiss this appeal on the ground that it does not present a substantial federal question, or, in the alternative, to affirm the decision of the Court of Appeal of the State of California

on the ground that the question presented is so insubstantial as not to warrant consideration by this Court.

STATEMENT OF THE CASE

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, attached to the Jurisdictional Statement as Appendix, adequately sets forth the factual and procedural matters which have transpired.

STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case also involves California Government Code section 845.8(a) which states:

> "Neither a public entity nor a public employee is liable for:
>
> "(a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release."

This case also involves 42 U.S.C. section 1983 which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

I. Does the public entity and public employee immunity for injuries resulting from a determination to parole or release a prisoner, or from determining the terms and conditions of parole or release, or from determining whether to revoke parole or release embodied in California Government Code section 845.8(a) violate either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

II. Does the parole or release of a prisoner into society create civil liability on the part of parole officials under U.S.C. section 1983 where the parolee or released person causes injury or death to a third party?

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

I

CALIFORNIA GOVERNMENT CODE SECTION 845.8(a) DOES NOT VIOLATE EITHER THE EQUAL PROTECTION CLAUSE OR THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Appellants apparently assert, without citing any authority, California Government Code section 845.8(a) is unconstitutional on due process and equal protection grounds. The twin concepts of due process and equal protection, although not always co-extensive, require the same type of analysis when a violation of either is alleged. *Hampton v. Mow Sun Wong* (1975) 426 U.S. 88 [96 S.Ct. 1895, 48 L.Ed.2d 495]. Substantive due process deals with protection from arbitrary legislative action, even though the person deprived of his right to life, liberty or property is afforded the fairest of procedural safeguards. In substantive law such deprivation is supportable only if the conduct from which the deprivation flows is prescribed by a reasonable legislation reasonably applied, *i.e.*, the law must not be unreasonable, arbitrary or capricious but must have a real and substantial relation to the object sought to be attained. See *Nebbia v. New York* (1933) 291 U.S. 502, 528 [78 L.Ed. 940, 949 and 54 S.Ct. 505]; *West Coast Hotel Co. v. Parrish* (1936) 300 U.S. 379, 391 [81 L.Ed. 703, 708; 57 S.Ct. 578]. The constitutional guarantee of equal protection of the laws has been judicially defined to mean that no person or class of persons shall be denied the same

protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness. See *Truax v. Corrigan* (1921) 257 U.S. 312, 336-338 [66 L.Ed. 254, 264-265]; *Kentucky, Co. v. Paramount Exch.* (1922) 262 U.S. 544, 550 [67 L.Ed. 1112, 1115; 43 S.Ct. 636]. The concept of equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.

Although research has disclosed no case, either federal or state, passing on the constitutionality of California Government Code section 845.8(a), other than the opinion rendered by the California Court of Appeal, Fourth Appellate District, Division One, in the instant action, the California courts have upheld the constitutionality of the California Tort Claims Act as a whole (*Datil v. City of Los Angeles* (1968) 263 Cal.App.2d 655, 660-661; *Miller v. Hoagland* (1966) 247 Cal.App.2d 57, 63) as well as the immunities for injuries caused by patients of mental institutions (*Goff v. City of Los Angeles* (1967) 254 Cal.App.2d 45, 51-52) and for injuries by or to prisoners (*Hughes v. County of San Diego* (1973) 35 Cal.App.3d 349, 351-353; *Reed v. City and County of San Francisco* (1965) 237 Cal.App.2d 23, 24-25). The *Hughes* case instructs that when an immunity under the California Tort Claims Act is under constitutional attack it can be overturned only where the statute bears no rational relationship to a conceivable legitimate state purpose. The stated purpose of California Government Code section 845.8(a) is to permit correctional personnel to make determinations of release or parole unfettered by any fear of tort liability (as set forth in the Law Revision Commission comment to that statute). To

impose tort liability in cases of parole and/or prisoner release would have a chilling effect on the decision-making process, impede implementation of trial release programs, prolong incarceration unjustifiably for many prisoners, and act as an impediment to the implementation of innovative parole and release programs. There is certainly a rational relationship between legitimate state purposes and Government Code section 845.8(a).

II

CORRECTIONAL OFFICIALS ARE NOT LIABLE UNDER THE FEDERAL CIVIL RIGHTS ACT, (42 U.S.C. § 1983) FOR THEIR DETERMINATION TO RELEASE A PRISONER WHERE THE PRISONER CAUSES DEATH OR INJURY TO A THIRD PARTY

Appellants allege appellees' release of the parolee in this case into society constituted a violation of the Federal Civil Rights Act (42 U.S.C. § 1983), when the life of appellants' decedent was taken. It has been established that state parole officials perform quasi-judicial functions in processing applications for parole and approving parole work or probation and are immune from liability for damages under the Federal Civil Rights Act. See *Burkes v. Callion* (9th Cir. 1970) 433 F.2d 318; *Allison v. California Adult Authority* (9th Cir. 1969) 419 F.2d 822; *Villalobos v. Dickson* (9th Cir. 1969) 408 F.2d 835; *Silver v. Dickson* (9th Cir. 1968) 403 F.2d 642, *cert. denied*, 394 U.S. 990.

Appellants have attempted to distinguish cases of this nature by urging they involved prisoner actions against parole officials for alleged denial of the right to liberty within

the context of processing individual parole applications. Appellees submit the fact that the previously cited cases dealt with prisoner actions against correctional officials is a mere difference which does not serve to distinguish the principles of those cases from the instant case. Appellants cite no authority to this Court upholding federal civil rights liability of parole officials in an action brought by a third party allegedly suffering harm at the hand of a released parolee.

The quasi-judicial immunity referred to in the aforementioned cases contains no language limiting applications of the immunity to an action brought by prisoners, but rather emphasizes application of the immunity based upon the "function" being performed. As members of the California Adult Authority, the individual appellees herein were performing a quasi-judicial function when they determined to release Thomas. Appellants allege malice as a factor against absolute immunity in this case. However, there were no *facts* alleged in the complaint for wrongful death to show malice. As the California Court of Appeal observed (Jurisdictional Statement, p. A-7) Thomas was eligible for parole, appellees determined he was ready for parole, and in the absence of a sure formula for appellees knowing when a convict is rehabilitated and ready to enter society, released Thomas. There is no liability for the complained-of injuries as pleaded under the Federal Civil Rights Act.

Appellants contend the cases of *Scheuer v. Rhodes* (1974) 416 U.S. 32 and *Wood v. Strickland* (1975) 420 U.S. 308 are applicable to the instant case. In *Scheuer* the question was whether the Governor of Ohio, the Adjutant General of the Ohio National Guard, and various guard officers and enlisted

members, could be liable under 42 U.S.C. section 1983 as a result of students killed on a state university campus during a period of alleged civil disorder in May of 1970, or whether these persons enjoyed an "absolute immunity" from liability. The Court, at 248, observed the Federal Civil Rights Act would be drained of meaning if a governor, or other high executive officer, could, through supreme edict, override conflicting rights of person and property without review of such an edict through the judicial process. *Scheuer* is easily distinguished from the present case. First, appellees do not contend that their privilege is absolute, only that a decision to release a prisoner is a quasi-judicial function made within the scope of their employment. Second, at the time appellees determined to release Thomas, they did so without knowledge their decision would override any conflicting personal or property rights, knowledge which this Court observed to be an important consideration in its decision in *Scheuer*.

In *Wood v. Strickland, supra*, this Court held school officials are entitled to a qualified good-faith immunity from liability for damages under the Federal Civil Rights Act, but are not immune from liability where they had actual or constructive knowledge that action taken within their sphere of official responsibility would violate the constitutional rights of the affected student, or where action was taken with malicious intention to cause a deprivation of rights or injury to the student. In *Wood*, high school students had been expelled from school for violating a school regulation prohibiting the use or possession of intoxicating beverages at school or school activities. Suits filed by the students alleged malice and ill will on the part of school officials, as well as the violation of "substantive due process." As in the *Scheurer*

case, the public officials in *Wood* acted with knowledge that their decision would have adverse consequences on the rights of defined individuals, *i.e.*, those persons who were the subjects of the decision. In this case, no such knowledge existed in the minds of appellees. The subject of appellees' decision was not any known consequences to the rights of Mary Ellen Martinez, as those rights would be affected several months later, but rather the propriety of the parole of Thomas.

CONCLUSION

No substantial federal question is presented by this appeal. Appellees respectfully move the Court to dismiss the appeal or, in the alternative, affirm the decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One.

Dated: April 27, 1979

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General of the
State of California

ANTHONY M. SUMMERS,
JEFFREY T. MILLER,
Deputy Attorneys General

Attorneys for Appellees

Supreme Court, U. S.
FILED
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DAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-1268

GEORGE MARTINEZ, et al.,

Appellants,

vs.

THE STATE OF CALIFORNIA, et al.,

Respondents.

On Appeal From The Court Of Appeal
Of The State Of California,
Fourth Appellate District, Division One

BRIEF OF APPELLANTS

DONALD McGRATH II
WILLIAM A. BRAMLEY III
ERIC V. BENHAM
THOMPSON, SULLIVAN, McGRATH
& McDONALD
1200 Third Avenue
San Diego, California 92101
Telephone: (714) 234-6781

In Association With
WALTER P. CHRISTENSEN

Attorneys for Appellants

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-1268

GEORGE MARTINEZ, et al.,

Appellants,

vs.

THE STATE OF CALIFORNIA, et al.,

Respondents.

On Appeal From The Court Of Appeal
Of The State Of California,
Fourth Appellate District, Division One

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is reported at 85 Cal.App.3d 430, 149 Cal.Rptr. 519, and is printed in the Appendix at page 38.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) as being an appeal which draws into question the validity of California Government Code §845.8(a) *infra*, page 4, on the ground that as construed it is repugnant to the Constitution of the United States.

Appellants seek damages from state officials for the wrongful death of their daughter. Demurrers to their Complaint were sustained on the ground that California Government Code §845.8(a) provides absolute immunity from civil liability for causing a loss of life because "there is a rational relationship between the state's purposes and the statute." (A.44)

The appeal herein is from a final judgment decided and filed by the Court of Appeal for the State of California, Fourth Appellate District, Division One, on September 22, 1978. On November 15, 1978, Appellants' Petition for Hearing in the Supreme Court of the State of California was denied. Notice of Appeal to the Supreme Court of the United States was filed in the Court of Appeal of the State of California, Fourth Appellate District, Division One, on February 5, 1979. On May 21, 1979, this court made an order noting probable jurisdiction of this matter.

As the Court of Appeal of the State of California explicitly rejected Appellants' challenge to the constitutionality of California Government Code §845.8(a), this matter is appropriately brought to this Court by appeal. *Sibron v. New York*, 392 U.S. 40 (1968).

ADDITIONAL GROUND OF JURISDICTION

The Appellants also contend that the judgment is founded on another error, which though it involves a question not subject to review by this Court of appeal, nevertheless deprived the Appellants of a fair hearing. The Court of Appeal of the State of California found that Respondents had absolute immunity from suit in an action brought under 42 U.S.C. §1983. This error is included in the statement of the questions presented by the appeal hereinafter set forth. If this were the only error complained of, Appellants would be limited to a petition for writ of certiorari under 28 U.S.C. §1257(3). It is included on this appeal under the authority of *Prudential Insurance Company of America v. Cheek*, 259 U.S. 530, 547 (1922) and *Flournoy v. Wiener*, 321 U.S. 253, 263 (1944).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case also involves California Government Code §845.8(a) which states:

> "Neither a public entity nor a public employee is liable for: (a) any injury resulting from determining whether to parole or release a prisoner or from determining the terms or conditions of his parole or release or from determining whether to revoke his parole or release."

This case also involves 42 U.S.C. §1983 which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

I. Whether California Government Code §845.8(a), When Construed To Grant Absolute Immunity To State Officials From Civil Liability For Their Acts Which Caused A Loss Of Life Violates The Due Process And Equal Protection Clauses Of The Fourteenth Amendment To The Constitution Of The United States.

II. Whether State Officials Have Absolute Immunity From Civil Liability In An Action Brought Pursuant To 42 U.S.C. §1983 For Acts Which Caused A Loss Of Life.

STATEMENT OF THE CASE

RICHARD JUNE-JORDAN THOMAS was convicted on December 12, 1969, of the attempted forcible rape of two young females at knifepoint in Tecolote Canyon in San Diego, California. From January to July, 1970, THOMAS was committed to the Atascadero State Mental Hospital for

observation where he was designated as a "Mentally Disordered Sex Offender" not amenable to treatment. In April, 1970, he was sentenced by the Honorable LELAND C. NEILSEN of the San Diego Superior Court for a period of six months to twenty years. That court made the specific comment that THOMAS should not be paroled. Although he had been designated as a "mentally disordered sex offender," had been adjudged by the Atascadero State Mental Hospital as "not amenable to treatment," and in fact had received no treatment while incarcerated, THOMAS was subsequently paroled on March 10, 1975. THOMAS was paroled even though he admitted to authorities that he did not feel himself ready for parole and feared actions he might take if he in fact was paroled. THOMAS' parole was subject to special conditions, including the condition that he regularly appear at a "parole out-patient clinic." In fact, THOMAS was not supervised, and the conditions which were attached to his parole were not met, and he did not regularly appear at his designated "parole out-patient clinic."

RICHARD JUNE-JORDAN THOMAS subsequently kidnapped and murdered MARY ELLEN MARTINEZ, age 15, on August 1, 1975, in the same Tecolote Canyon of San Diego, California. THOMAS was duly convicted and on April 13, 1976, the Honorable EDWARD T. BUTLER sentenced THOMAS to death in the San Quentin state prison gas chamber.

Appellants' original Complaint for Damages for Wrongful Death and Civil Rights Violation (A.1) was filed with the San Diego Superior Court on May 25, 1976. The Honorable LOUIS M. WELSH filed a Minute Order (A.16) with the Court on September 1, 1976, which sustained Respondents' Demurrer

as to causes of action I, II, III, IV, V and VI, with leave to amend causes of action I and VI.

Appellants' First Amended Complaint (A.19) repleads causes of action II, III, IV and V verbatim from their original Complaint (A.1) and incorporates amended portions of causes of action I and VI. The gravamen of Plaintiff's charges were as follows:

1. The first cause of action alleges that Respondent members of the California Adult Authority acted in a manner so unreasonable and so abused the exercise of their discretion and judgment in releasing THOMAS on parole that their conduct was outside the course and scope of their employment.

2. The second cause of action alleges that Respondent parole officials negligently and recklessly performed ministerial acts in releasing THOMAS.

3. The third cause of action alleges that Respondent parole officials negligently and recklessly failed to warn probable victims of their release of THOMAS.

4. The fourth cause of action alleges that Respondent parole officials wilfully, wantonly and maliciously failed to supervise THOMAS while on parole.

5. The fifth cause of action alleges that Respondent parole officials' acts under color of state law subjected MARY ELLEN MARTINEZ to deprivation of a fundamental constitutional right without due process.

6. The sixth cause of action alleges that Respondent parole officials acted wilfully, maliciously, wantonly and recklessly in

paroling THOMAS, in failing to supervise him and in failing to warn victims of his release; and alleges the knowledge and ratification of their acts by the State of California.

The first and sixth causes of action were subsequently demurred to by Respondents on October 14, 1976, and the Honorable DOUGLAS R. WOODWORTH sustained Respondents' Demurrer (A.35) as to those causes of action on November 8, 1976, without leave to amend.

On December 20, 1976, Appellants appealed from the Notice of Entry of Judgment of November 24, 1976. The Court of Appeal of the State of California, Fourth Appellate District, Division One, affirmed the lower Court's ruling on September 22, 1978 (A.38). The Supreme Court of the State of California denied Appellants' Petition for Hearing on November 15, 1978, (A.46) and the judgment of the Court of Appeals was entered on November 27, 1978.

On May 21, 1979, this court made an order noting probable jurisdiction in the matter.

SUMMARY OF ARGUMENT

I

PRELIMINARY STATEMENT

This case involves a significant social issue. That issue is whether state parole officials should be absolutely immune from civil liability for the grossly negligent or reckless release of highly dangerous prisoners. The question is whether it is necessary or appropriate to give unbridled discretion to parole officials.

This case arises in the context of a deprivation of a fundamental constitutional right. Because absolute immunity facilitates the deprivation of constitutional rights and is not necessary to a compelling state interest, this court should find that parole officials have only a qualified immunity.

II

STATE PAROLE OFFICIALS HAVE ONLY A QUALIFIED IMMUNITY FROM CIVIL LIABILITY FOR THEIR ACTS WHICH VIOLATE THE CONSTITUTIONAL RIGHTS OF INDIVIDUAL MEMBERS OF THE PUBLIC PURSUANT TO 42 U.S.C. § 1983

Appellants allege in their complaint that the acts of Respondent parole officials under color of state law caused the death of MARY ELLEN MARTINEZ. The California courts found that the state officials were absolutely immune from suit under 42 U.S.C. § 1983. In the recent case of *Butz v. Economou*, 438 U.S. 478 (1978), this court concluded that absolute immunity from suit for unconstitutional conduct was appropriate only in exceptional situations. The critical factor affecting the appropriate degree of immunity is the availability of procedural safeguards to restrain unconstitutional conduct. There are no procedural safeguards that restrain unconstitutional conduct by parole officials other than the availability of civil suit pursuant to 42 U.S.C. § 1983. The conduct of parole officials is not subject to voter approval, parole proceedings are not adversarial in nature and the interests of the public are not independently represented.

The facts of this case are analogous to that presented in *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Like the Governor of Ohio, these parole officials sent a dangerous force into society under circumstances which indicate their lack of good faith. Even though the *Scheuer* situation demanded prompt action to protect the public safety, absolute immunity was found inappropriate. In contrast, public safety demands that parole officials act with caution in paroling dangerous felons.

Qualified immunity has been found appropriate in other situations involving bureaucratic officials. It has been held that school officials must act in good faith in expelling a student from school. It has also been held that prison officials who exhibit a deliberate indifference to violating constitutional rights are subject to suit. Parole officials are not the type of official whose functions demand a full exemption from liability for constitutional violations.

III

CALIFORNIA GOVERNMENT CODE § 845.8(a) IS UNCONSTITUTIONAL AS CONSTRUED BY THE CALIFORNIA COURTS

The California Court of Appeal interpreted California Government Code § 845.8(a) to grant absolute immunity to parole officials. So construed, this statute facilitated and encouraged the state officials to exercise their authority in a grossly negligent or reckless manner causing the death of MARY ELLEN MARTINEZ.

This court has held that certain rights are of such importance that they must be considered fundamental. State action which

infringes on such rights can be justified only by a compelling state interest. Life is expressly protected from deprivation by state action without due process by the Fourteenth Amendment to the U.S. Constitution and must be considered a fundamental right.

California Government Code § 845.8(a) is not necessary to the accomplishment of a compelling state interest. The interests supporting immunity for parole officials are either not compelling or are adequately served by qualified immunity. Requiring parole officials to act in good faith would not inhibit them from exercising the duties of their office in a legitimate manner. The state's interest in public safety is best served by holding members of the California Adult Authority to a "good faith" standard of conduct rather than immunizing them from liability for the grossly negligent and reckless release of highly dangerous felons. The right of a prisoner to a fair parole hearing is adequately served by requiring parole officials to act in good faith.

Although California Government Code § 845.8(a) serves no compelling state interest in the context of the deprivation of a fundamental constitutional right, the California Court of Appeal held that the statute was constitutional because "there is a rational relationship between the state's purposes and the statute." (A.44) The broad sweep of Government Code § 845.8(a) as construed by the California Court of Appeal is unjustified and amounts to a denial of due process.

IV

STATE PAROLE OFFICIALS WHO ARE GROSSLY NEGLIGENT OR RECKLESS IN THE RELEASE OF HIGHLY DANGEROUS PRISONERS ARE NOT ACTING IN "GOOD FAITH"

In evaluating the conduct of public officials, this court has applied an objective test of good faith. In *Wood v. Strickland*, 420 U.S. 308 (1975), it was stated that members of a parole board would be liable to suit under 42 U.S.C. § 1983 if they knew or reasonably should have known that their acts would violate constitutional rights.

Evaluating the conduct of parole officials objectively, one can determine that their grossly negligent or reckless release of highly dangerous prisoners does not satisfy the requirements of good faith. In *Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977), the Supreme Court of Arizona used a rationale analogous to that presented by this court in *Butz v. Economous, supra*. Because of the lack of safeguards to restrain the unconstitutional conduct of parole officials, that court held that parole officials should not be immune for grossly negligent or reckless release of highly dangerous prisoners.

The adoption of this test measuring good faith conduct of parole officials will provide an adequate safeguard from conduct likely to cause a deprivation of constitutional rights.

ARGUMENT

I

PRELIMINARY STATEMENT

The incidence of violent crimes in our country is among the most significant social issues of our day. Of particular concern are those violent crimes committed by convicted felons released on parole as rehabilitated. The overwhelming evidence is to the effect that our prisons are totally ineffective in rehabilitation. Indeed, it seems that prison effectively turns first-time offenders into confirmed, life long criminals. A shocking proportion of all violent crimes is committed by persons who have been convicted repeatedly of such crimes but who are routinely released as rehabilitated after a fraction of their sentence is served.

In light of figures showing astronomically high rates of recidivism, it is outrageous to expect the public alone to bear the risk that these rehabilitative efforts will fail without holding parole officials to a "good faith" requirement.

Appellants acknowledge the heavy burden of proof that accompanies an action brought against officials covered by a qualified immunity. Whatever atrocities may be visited on innocent members of the public by criminals released by parole officials in the negligent performance of their duties is without redress; but surely if the burden be met and it be shown that officials have acted in "bad faith," the public welfare is ill-served by the shield of absolute immunity.

The Supreme Court of Arizona came to precisely this conclusion in *Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977).

> ". . . The question arises whether such unbridled discretion is appropriate in our modern society . . . In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous . . . It is clear that the policy reasons for official immunity are much weaker than for judicial immunity. Thus, logic requires a lesser immunity; for immunity deprives individuals of a remedy for wrongdoing and should be bestowed only when and at the level necessary. We hold that absolute immunity for public officials in their discretionary functions acting in other than true judicial proceedings is not required and indeed is improper. We have come to this conclusion because of the increasing power of the bureaucracy - the administrators - in our society . . . The more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their most outrageous conduct. There may even be some deterrent value in holding officials responsible for shocking, outrageous actions. In any case, democracy by its very definition implies responsibility." *Id.* 1232-1233.

This court is not asked to assess the general propriety of the absolute immunity doctrine. Rather, this court must determine the impact of that doctrine on violations of fundamental constitutional rights. Appellants submit that no compelling state interest justifies absolute immunity for administrative officials in this context.

II

STATE PAROLE OFFICIALS HAVE ONLY A QUALIFIED IMMUNITY FROM CIVIL LIABILITY FOR ACTS WHICH VIOLATE THE CONSTITUTIONAL RIGHTS OF INDIVIDUAL MEMBERS OF THE PUBLIC PURSUANT TO 42 U.S.C. § 1983

A. Appellants Have Alleged A Violation Of The Federal Civil Rights Act, 42 U.S.C. § 1983.

Appellants' fifth and sixth causes of action of their First Amended Complaint are for damages for violation of federal civil rights pursuant to 42 U.S.C. § 1983. (A.28-31)

Those causes of action allege that the acts of the individual Respondents, under color of state law, caused the death of MARY ELLEN MARTINEZ. It is clear that an action for wrongful death may be brought under the federal Civil Rights Act. The civil rights legislation was designed to protect citizens not only from violence that would injure, but also from violence that would kill. *Brazier v. Cherry* 293 F.2d 401 (5th Cir. 1961). In *Alvarez v. Wiley*, 71 Cal.App.3d 599, 604 (1977), the California Court of Appeal discussed the relationship of the state wrongful death statute with section 1983:

> ". . . if an action for the wrongful death of a relative is brought under the federal Civil Rights Act in a state court, then the state wrongful death statute will govern any claim for damages . . . This is because the federal courts have held that although no remedy is expressly provided under the federal Civil Rights Act for the death of a relative, section 1988 incorporates the state wrongful death statutes into section

> 1983 actions in order to effectively implement the policies of the federal act."

See also *Wolfer v. Thaler*, 525 F.2d 977 (5th Cir. 1976); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974).

B. California Statutory Immunity Is Irrelevant To An Action Brought Under 42 U.S.C. § 1983.

The trial court concluded that California Government Code § 845.8(a) barred MARTINEZ from stating a cause of action under 42 U.S.C. § 1983 (A.17). Such a conclusion was clearly incompatible with the supremacy clause of the Constitution. In *McCulloch v. Maryland*, 4 Wheat. 316, 436 (1819), Chief Justice Marshall stated:

> "[T]he states have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

Case law specifically holds that state law of immunity for public officials does not control in the interpretation of federal civil rights actions pursuant to 42 U.S.C. § 1983. *Kletschka v. Driver*, 411 F.2d 436 (2nd Cir. 1969). In *Donovan v. Reinbold*, 433 F.2d 738, 742 (9th Cir. 1970), it was stated:

> "Congress has not evinced any intention to defer to the states the definition of the federal right created in section 1983, or to adopt the states' remedies or procedures for the vindication of that right. It has never indicated an intent

> to engraft onto the federal right state concepts of sovereign immunity or of state susceptibility to suit, which are the concepts that are the roots of the California Tort Claims Act. Indeed, the history of section 1983, summarized in *Monroe v. Pape, supra,* 365 U.S. 167 . . . vividly demonstrates that state concepts of sovereign immunity were alien to the purposes to be served by the Civil Rights Act."

More recently the California Supreme Court conceded in *Williams v. Horvath,* 16 Cal.3d 834, 840 (1976), that "California may not impair federally created rights or impose conditions on them".

Public officials are protected from suit under 42 U.S.C. § 1983 by an immunity, the source of which stems from federal common law and not state statutes. The extent and application of that immunity is examined in detail herein.

C. The California Court Of Appeal Held That State Parole Officials Were Absolutely Immune From Civil Liability Under 42 U.S.C. § 1983.

The First Amended Complaint alleges that the conduct of Respondent state officials was reckless, malicious, wilful and wanton (A.25, 27, 30-31). The Court of Appeal of the State of California held that these state officials were immune from civil liability for their acts.

> "As members of the Adult Authority, they are performing quasi-judicial functions when they make determinations regarding parole and are immune from suit under the civil rights act." (A.42)

The conclusion of the Court of Appeal is therefore that the state parole officials are absolutely immune from suit under 42 U.S.C. § 1983, regardless of the nature of their acts.

Appellants assert that Respondents enjoy only a qualified immunity as to injuries to the public which does not protect their acts done in bad faith.

D. Absolute Immunity Is Inappropriate To Civil Rights Actions Under 42 U.S.C. § 1983.

1. Absolute Immunity Applies Only In Exceptional Situations.

In *Butz v. Economou,* 438 U.S. 478 (1978), this court analyzed in detail the justification for immunizing federal officials from civil liability for violations of constitutional rights. The court applied the rationales supporting immunity in suits brought against state officials under 42 U.S.C. § 1983. Those rationales were stated to be:

> "1. The injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligation of his position, to exercise discretion;
>
> 2. The danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* at 497.

Applying these rationales, the court determined that federal executive officials should have only a qualified immunity from civil suit for their unconstitutional acts,

> ". . . subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* at 507.

With respect to state parole officials the same analysis shows no exceptional circumstances which would make absolute immunity essential to the conduct of their duties.

The court's analysis of the officials in *Butz* focused on the duties of those officials and those factors which would act to restrain an abuse of discretion on their part. Absolute immunity was found appropriate only for those officials which are a part of the judicial process such as judges and prosecutors or analogous officials within a federal administrative agency. Of importance in that determination were those features of the judicial process which tend to enhance the reliability of information and the impartiality of decision-making. These features included:

1. The adversarial nature of the proceedings.
2. The right to an independent trier of fact.
3. The right to present evidence.
4. The right to a record of the proceedings.
5. The right to know the findings and conclusions on all issues of fact, law or discretion presented on the record.

2. Qualified Immunity Is Appropriate As A Safeguard To Restrain Unconstitutional Conduct.

The critical factor affecting the court's decision in *Butz* was the availability of procedural safeguards to control the official's unconstitutional conduct. Because the purpose of § 1983 is to

safeguard constitutional rights the court stated that absolute immunity was appropriate only in those situations where there were sufficient procedural safeguards to provide a remedy for the official's unconstitutional conduct. Such safeguards were found to be an integral part of the judicial process. Those administrative officials who were found to be functionally equivalent to true judicial officers were given absolute immunity. Those who were not were held subject to the requirements of good faith set forth in *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

In contrast to those officials given absolute immunity in *Butz* the parole officials here involved have no functional equivalence to judicial officers. The granting of parole is not an adversarial process. The interests of the decedent were totally unrepresented. There is no independent trier of fact, right of confrontation, right to present evidence, or right of appeal on behalf of the public. With respect to MARTINEZ, these parole officials are akin to the state officials in *Scheuer* who were alleged to have recklessly and maliciously sent the National Guard with loaded weapons out into the public. These officials of the California Adult Authority sent RICHARD JUNE-JORDAN THOMAS out into society under circumstances indicating that he was an equally dangerous threat to the public safety.

American jurisprudence assumes that all individuals, whatever their position in government, are subject to federal law.

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the governments, from the highest to the lowest, are

creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220 (1882).

Only in the exceptional situation where constitutional rights are otherwise adequately safeguarded may absolute immunity be applied.

The case of *Scheuer v. Rhodes*, 416 U.S. 232 (1974), illustrates the inappropriateness of applying absolute immunity in situations involving alleged civil rights violations. *Scheuer, supra* involved an action brought under section 1983 for the death of students killed by Ohio national guardsmen at Kent State University in May, 1970. Appellants brought suit against the governor, adjutant general and assistants because they:

> " 'Intentionally, recklessly, wilfully, and wantonly' caused an unnecessarly (*sic*) deployment of the Ohio national guard on the Kent State campus . . . which resulted in the death of plaintiffs' decedents . . . the complaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of the office." *Id.* at 235.

Chief Justice Burger, writing for a unanimous court, carefully analyzed the asserted justifications for immunity. Taking into account the need of high executive officials to act swiftly and promptly and to be able to rely on the information available to them, he concluded that:

> "Under the criteria developed by precedents of this court, § 1983 would be drained of meaning

> if we were to hold that the acts of a governor or high executive officer have 'the quality of a supreme and unchangeable edict, overriding all conflicting rights' . . . These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Id.* at 247-248.

The reasons for limiting immunity which were advanced in *Scheuer* are equally applicable to the present fact situation. Indeed, defendants in *Scheuer* had a greater justifiable expectation that they would be immune from liability than Respondents have. For one thing, the executive officers in *Scheuer* were forced by the nature of the situation to make a quick decision as to whether to release a potentially dangerous force into society based on the information available to them at the time. In contrast, Respondents could and should have taken every precaution, gathered whatever information was reasonably necessary for a fair and complete evaluation before releasing this certainly dangerous force into society.

The *Scheuer* situation is one in which the freedom to act is to be encouraged because any impediment to quick action may resound to the detriment of the public safety. Yet, the court

correctly concluded that absolute immunity was unnecessary to achieve the requisite freedom of action. In contrast, in the parole of dangerous felons, the same considerations cut in the opposite direction. Greater freedom of action is a potential hazard to public safety. In this area of official conduct, it is in the public's interest to discourage precipitous action as well as the reckless and malicious action herein alleged. The rights of prisoners to a fair parole hearing are not prejudiced by the imposition of a "good faith" standard of conduct on parole board officials. But absolute immunity is a blank check which does nothing for the legitimate interests of prisoners or society, but rather encourages reckless and malicious action which endangers the public.

3. Qualified Immunity Has Been Applied To Bureaucratic Officials.

Courts have generally drawn a distinction among branches of government as to whether absolute or qualified immunity is appropriate. These distinctions have proven difficult to apply in the ever-growing "fourth branch of government", the bureaucracy. Our citizens have increasing contact with government in the form of administrations, authorities, boards, commissions and departments, which though nominally a part of the executive branch, perform legislative and judicial as well as executive functions. But even though bureaucratic bodies may perform judicial functions, the non-public nature of bureaucratic proceedings justifies application of a good faith requirement. The devices designed to protect abuse of the judicial process are generally absent from bureaucratic proceedings, including those of parole boards.

> "For years, the legislature has nelgected its responsibility of providing guidelines for boards charged with parole decision making . . . the parole board is one of the last bastions of unchecked arbitrary power in America." *Calfornia State Assembly, Report of the Select Committee on the Administration of Justice, Parole Board Reform in California, Order Out of Chaos,* (1970).

It is not in the public interest that parole boards enjoy such unchecked arbitrary power. Absolute immunity for acts which exceed constitutional limits is now applied only in exceptional situations. Otherwise, this court has recognized that section 1983 was "intended to expose state officials to damages liability in some circumstances." *Procunier v. Navarette,* 434 U.S. 555, 561 (1978).

In *Wood v. Strickland,* 420 U.S. 308 (1975), two girls were suspended from high school for possession of intoxicating beverages at a school acitivity. The students brought an action for damages under 42 U.S.C. § 1983 against the school board, claiming that their federal constitutional rights of due process had been denied under color of state law. Justice White's opinion for the court analyzed the role of the particular officials:

> "As the facts of this case reveal, school board members function at different times in the nature of legislatures and adjudicators in the disciplinary process." *Id.* at 319.

Nevertheless, the court found absolute immunity unjustified:

> ". . . The judgment implicit in this common-law development is that absolute immunity would not be jusitifed since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Id.* at 320.

If the right of high school students not to be expelled is of sufficient importance that school board members may be required to act in good faith, then it is reasonable to expect that the life of a high school student is also of sufficient import that parole board members should be subject to the same standard. It must be understood that the standard of "good faith" imposed by the qualified immunity test of the *Butz, Scheuer* and *Wood* cases imposes a heavy burden of proof upon Appellants. In addition to proving the elements of a cause of action under 42 U.S.C. § 1983, they must show a lack of "good faith" on the part of Respondents. Thus, the question is properly framed as follows: Could Appellants state a cause of action against a school board whose bad faith actions expelled MARY ELLEN MARTINEZ from school, but be barred from stating a cause of action against parole board members whose bad faith actions caused her death?

In *Procunier v. Navarette*, 434 U.S. 555 (1978), this court analyzed the immunity doctrine in the context of a section 1983 suit by a prisoner against prison officials alleged to have negligently deprived him of constitutional rights. Summary judgment against the prisoner's claim was upheld based on the determination that section 1983 does not afford a remedy for

mere negligent deprivation of constitutional rights. However, the scope of immunity available to these officials was clearly not absolute:

> "We agree with petitioners that as prison officials and officers, they were not absolutely immune from liability in this section 1983 damages suit and could rely only on the qualified immunity described in *Scheuer v. Rhodes, supra*, and *Wood v. Strickland, supra*. Note 7 . . . N7. The Courts of Appeals have generally accorded prison and jail administrators performing discretionary functions a qualified immunity for monetary liability under section 1983. (citations)" *Id.* at 561.

Clearly, "a public official may be held liable in damages when his actions are found to violate a constitutional right . . ." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 707 (1977).

MARTINEZ has alleged that these same officials of the California Adult Authority acted recklessly, wilfully, wantonly and maliciously in causing the death of MARY ELLEN MARTINEZ. MARTINEZ seeks the opportunity to present evidence that the acts of these officials "exhibit deliberate indifference to the risk of causing the harm that gives rise to a constitutional claim." *Procunier v. Navarette, supra*, at 568. (Berger, C.J., dissenting.)

The *Scheuer-Butz* line of cases represent the governing principles for resolving the question of damage actions against officers of government. The rationale is that a qualified immunity satisfies the competing interests of public safety and a zealous bureaucracy. A considered inquiry into the position and

role of the relevant officials here would not place them among those whose special functions demand a full exemption from liability for constitutional violations.

III

CALIFORNIA GOVERNMENT CODE § 845.8(a) IS UNCONSTITUTIONAL AS CONSTRUED BY THE CALIFORNIA COURTS

A. The California Court Of Appeal Interpreted Government Code § 845.8(a) To Grant Absolute Immunity To Parole Officials For Violating A Fundamental Constitutional Right.

California Government Code § 845.8(a) absolves members of the California Adult Authority of civil liability arising out of the decision to parole or revoke parole of a prisoner. In granting immunity from civil suit, § 845.8(a) departs from the fundamental legal policy of promoting distributive justice. For this reason, the statute should be interpreted narrowly. Nevertheless, the Court of Appeal of the State of California interpreted Government Code § 845.8(a) as precluding a remedy for violation of an express Constitutional right.

Such a grant of absolute and total immunity to any person holding office as a member of the California Adult Authority must be regarded as facilitating and encouraging such state officials to exercise their authority in a grossly negligent or reckless manner. Martinez contends that so construed or applied to the facts of this case, California Government Code § 845.8(a) violates the Fourteenth Amendment of the United States Constitution by depriving MARY ELLEN MARTINEZ of life without due process of law.

B. Life Is A Fundamental Right.

This court has held that certain rights are of such importance that they must be considered fundamental. In *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), Justice Cardozo defined rights as fundamental which were:

> ". . . of the very essence of a scheme of ordered liberty . . . a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "

The Fourteenth Amendment to the United States Constitution expressly protects life from deprivation by state action without due process. As Justice Brennan stated in his dissenting opinion in *Paul v. Davis*, 424 U.S. 693, 717 (1975):

> "There is simply no way in which the court . . . could declare that the loss of a person's life is not an interest cognizable within the 'life' portion of the due process clause."

The right to physical safety at the hands of the state is a right so basic that many other rights regarded as fundamental are of little consequence by comparison. The right to vote or speak freely may be essential to our scheme of ordered liberty but certainly no less so than the right to live at all.

C. Due Process Demands That Life Not Be Denied Unless Justified By A Compelling State Interest.

Recognizing that the right to life is a fundamental interest and that California Government Code § 845.8(a) encouraged and facilitated the deprivation of Appellant's life, the question

remains as to what the demands of due process are with respect to the facts of this case. Where a fundamental or constitutionally protected right is involved, this Court has held taht infringement of that right may be justified only where necessary to support a compelling state interest, *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate interests at stake, *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). Martinez contends that life is a right so fundamental that its deprivation may be justified only by a compelling state interest.

This court has recognized substantive rights of privacy, procreation, contraception, child bearing, and free speech which can be limited only by showing a compelling state interest. Life, a right as fundamental as any recognized, deserves just as formidable a protective barrier. In *Roe v. Wade*, 410 U.S. 113, 155 (1973), Justice Blackman, in discussing the protection afforded a woman's right to control her pregnancy stated:

> "Where certain 'fundamental rights' are involved, the court has held that regulation limiting these rights may be justified only by a 'compelling state interest'. . . and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake. . . ."

The California Court of Appeal determined that the type of right or harm was irrelevant to the standard of review for applicable state action. It is well settled that the nature of the invasion upon an individual right to a large extent determines the degree of justification the state must establish in constitutional adjudication. The Court of Appeal held "there is a rational relationship between the state's purposes and the statute" (A.44) and found that to be a sufficient basis for the

constitutional validity of the statute. By holding that the state's statute may abridge the fundamental right to life absent a compelling state interest, the Court of Appeal committed plain error and such holding is sufficient grounds for reversal.

D. Government Code § 845.8(a) Serves No Compelling State Interest In The Context Of This Case.

Various reasons have been advanced to justify the enactment and continued existence of California Government Code § 845.8(a). Analysis of the constitutional validity requires considerable inquiry into the competing interests involved in the legislative enactment and of society's interest in public safety. The harm that may be caused by inhibiting the governmental function of parole decision making must be balanced against the desirability of providing redress for a narrow class of substantive wrongs. An analysis of the state interests served by the absolute immunity doctrine shows that those interests are either not compelling or that absolute immunity is unnecessary to their accomplishment.

The court below cited the California law revision commission comment to Government Code § 845.8(a) to the effect that parole board members should have absolute immunity to perform their duties without pressure and fear of civil suit. This rationale concentrates on the injustice of subjecting those charged with a discretionary function to liability, and the necessity of protecting the decision making process.

While recognizing this interest as important, it cannot be viewed as so compelling as to override the paramount right to life. The question is essentially where to draw the line between

the basic constitutional duty of the state's agents and the assumption of responsibility by the public for society's rehabilitative efforts. This line may not constitutionally be drawn in favor of immunizing the Respondents totally without regard to the purpose, motive or reasonableness of their conduct. Furthermore, this interest is adequately served by a qualified immunity. A good faith standard would not inhibit parole officials from exercising the duties of their office in a legitimate manner.

It is not in the public interest to encourage the reckless and malicious release of dangerous felons. The duties and responsibilities of parole officials include the protection of the public safety. To the extent that absolute immunity encourages a grossly negligent, reckless or malicious exercise of discretion, such immunity is not in the public's interest. The state's interest in protecting the bad faith activity of its officials is certainly less important than the fundamental constitutional right at stake.

The public safety is a state interest of compelling proportions bearing upon application of Government Code § 845.8(a). A distinction must be drawn between suits by prisoners, where the state's interest in public safety would favor immunizing parole officials from suit by prisoners denied parole, and suits by members of the public for injuries or death caused by paroled officials. A suit by a member of the public for injuries or death caused by a paroled prisoner discourages the reckless and malicious parole of felons. The state's interest in the public safety is best served by holding members of the California Adult Authority to a "good faith" standard of conduct, not by immunizing them from liability for the grossly negligent and reckless release of dangerous felons into society. As is stated in *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974):

> "It is important to note, even at the outset, that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public."

The right of a prisoner to a fair parole hearing is also a compelling state interest. However, a prisoner has no legitimate interest in being paroled when a good faith appraisal of his record shows that he is not entitled to be released. Martinez believes that qualified immunity provides sufficient protection for the prisoner. All that is required of state officials is good faith, certainly a minimal standard of conduct. A qualified immunity with an appropriate standard of conduct is a less intrusive alternative that would not interfere with the execution of correctional policy or impinge upon the legitimate interests of prisoners.

A grant of absolute immunity is not justified by any of these potentially compelling state interests in the context of a suit by an injured member of the public. When state interests impinge on fundamental rights,

> "Legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. . . ." *Roe v. Wade*, 410 U.S. 113, 155 (1973).

The legitimate state interests at stake in this case may be fully realized by qualified immunity.

For these reasons, the broad sweep of Government Code § 845.8(a) as construed by the Court of Appeal is unjustified and amounts to a denial of due process.

IV

STATE PAROLE OFFICIALS WHO ARE GROSSLY NEGLIGENT OR RECKLESS IN THE RELEASE OF HIGHLY DANGEROUS PRISONERS ARE NOT ACTING IN "GOOD FAITH"

A. This Court Has Applied An Objective Test Of Good Faith.

In *Wood v. Strickland*, 420 U.S. 308, 322 (1975) this court stated:

> "We hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected. . . ."

The relationship between parole officials and an injured member of the public is akin to that presented in *Scheuer v. Rhodes*, 416 U.S. 232 (1974). As in *Scheuer*, the officials in the case at bar were unaware of the identity of the person whose constitutional rights were abridged at the time of their exercise of discretion. In *Scheuer*, the good faith exercise of discretion was evaluated objectively:

> "It is the existence of reasonable grounds for the belief formed at the time and in light of the circumstances, coupled with good faith belief that affords a basis for qualified immunity. . . ." *Id.* at 247.

Factually, this case is analogous to *Scheuer, supra*, and falls squarely within the purview of section 1983 and the Fourteenth Amendment to the United States Constitution. Why then did the California Courts at the intermediate appellate level and the State Supreme Court fail to apply a limited immunity and the "good faith" test of *Scheuer*? The only plausible answer is that the communication of that standard has not been received and understood by the California courts. Communication, by its very definition, requires mutual understanding. This court has obviously not been understood by the courts of the State of California. Accordingly, this court must now announce the Supreme law of the land through the medium of the decision in this case.

B. Grossly Negligent Or Reckless Conduct Cannot Be "Good Faith."

The case of *Grimm v. Arizona Board of Pardons and Paroles*, 115 Ariz. 260, 654 P.2d 1227 (1977), involved the release of a dangerous prisoner who subsequently killed an individual. The court held that parole officials owed a duty to individual members of the general public in exercising their discretion to parole a prisoner with a history of violent and dangerous conduct.[1/] The standard of care owed is that of avoiding

---

[1/] The Arizona Court relied on Restatement (Second) of Torts § 319 (1965), "Duty of those in charge of person having dangerous propensities.":

> "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

grossly negligent or reckless release of highly dangerous prisoners.

In establishing that standard, the Supreme Court of Arizona used a rationale analogous to that presented by this court in *Butz v. Economou,* 438 U.S. 478 (1978). The *Grimm* court stated:

> "In many bureaucratic and administrative decisions, there are few or no safeguards to take care of wrong, harmful decisions. Members of the legislature may be voted out of office - as may judges in Arizona. Judges may be reversed by an Appellate Court. The Board of Pardons and Paroles, however, has had no check on its unbridled discretion . . . we now abolish the absolute immunity previously granted to public officials in their discretionary functions. We have come to this conclusion because of the increasing power of the bureaucracy - the administrators - in our society. The authority wielded by so-called faceless bureaucrats has often been criticized . . . the more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their most outrageous conduct . . . in any case democracy by its very definition implies responsibility . . . in this day of increasing power wielded by governmental officials absolute immunity for non-judicial, non-legislative officials is outmoded and even dangerous." *Id.* at 1232-1233.

C. State Parole Officials Should Not Be Immune For Their Grossly Negligent Or Reckless Release Of Highly Dangerous Prisoners.

Martinez proposes that the test formulated by the Supreme Court of Arizona in the *Grimm* case is in accord with the concern shown by this Court in *Butz* that there be adequate safeguards to prevent the infringement of constitutional rights by parole officials.

The standard of conduct enumerated in *Grimm,*

> *"avoiding grossly negligent or reckless release of a highly dangerous prisoner,"* *Id.* at 1234 (emphasis ours).

strikes a proper balance between the competing interests. The adoption of this test will protect the public from premature release of highly dangerous prisoners. Concurrently, the board members' interests will be protected since they will be free from liability in cases where they have made reasonable decisions.

This test is consistent with and a direct application of the more general test of "good faith" which this court has repeatedly employed in other contexts.

Finally, and more importantly, the adoption of this test in measuring the good faith conduct of parole officials will provide an adequate safeguard from conduct likely to cause the deprivation of constitutional rights.

CONCLUSION

For the foregoing reasons we respectfully submit that this Court should decide that state parole officials are not absolutely immune from suit under the Civil Rights Act, 42 U.S.C. § 1983. We also urge this court to find that as construed, or as applied to the facts of this case, California Government Code § 845.8(a) is unconstitutional because it caused the deprivation of a fundamental constitutional right and is not necessary to the accomplishment of a compelling state interest. We further urge this court to decide that "good faith" of parole officials is inconsistent with their grossly negligent or reckless release of highly dangerous prisoners.

Respectfully submitted,

THOMPSON, SULLIVAN, McGRATH
& McDONALD

By: DONALD McGRATH II
WILIAM A. BRAMLEY III
ERIC V. BENHAM

In Association With
WALTER P. CHRISTENSEN

Attorneys for Appellants

Supreme Court, U. S.
FILED
AUG 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-1268

GEORGE MARTINEZ, et al.,

Appellants,

vs.

THE STATE OF CALIFORNIA, et al.,

Appellees.

On Appeal From The Court Of Appeal
Of The State Of California,
Fourth Appellate District, Division One

BRIEF OF APPELLEES

GEORGE DEUKMEJIAN,
Attorney General of the
State of California
ROBERT L. BERGMAN,
Assistant Attorney General
JEFFREY T. MILLER,
Deputy Attorney General
110 West "A" Street, Suite 700
San Diego, California 92101
Telephone: (714) 237-7762

Attorneys for Appellees

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (CA4 1976), *cert. denied*, 429 U.S. 827 (1977) 28,34,35

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Sykes v. State of California (Dept. of Motor Vehicles), 497 F.2d 197 (CA9 1974) 21

Thompson v. Burke, 556 F.2d 231 (CA3 1977) . 27

Turpen v. Booth, 56 Cal. 65 (1880) 26

United States ex rel. Johnson v. Specter, 262 F.Supp. 113 (E.D. Pa. 1967) 26

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MISCELLANEOUS

Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 Wash. U.L.Q. 243 37

Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions* (1970) 23 J. Legal Ed. 24 46

Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways* (1968) 4 Trial 29 46

Devitt and Blackmar, *Federal Jury Practice & Instructions* 58

Diamond, *The Psychiatric Prediction of Dangerousness* (1975) 123 U.Pa. L.Rev. 439 46

Ennis & Litwack, *Psychiatry, and the Presumption of Expertise: Flipping Coins in the Courtroom*, (1974) 62 Cal.L.Rev 693 46

Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L.Rev. 209 (1963) 62

Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment* (1968) 117 U. Pa.L.Rev. 75 46

McCormack, *Federalsim and Section 1983*, 60 Va.L.R. 1 (1974) 58,66

Monahan, *The Prevention of Violence, in Community Mental Health and the Criminal Justice System* (Monahan edit. 1975) 46

TABLE OF CITATIONS (Continued)

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N. Morris, *The Future of Imprisonment* 47 (1974) 37

W. Prosser, *Law of Torts* (4th Ed. 1971) 60,62

Rubin, *Prediction of Dangerousness in Mentally Ill Criminals* (1972) 27 Archives of Gen. Psychiatry 397 46

Shapo, *Constitutional Tort: Monroe v. Pape and Beyond*, 60 Nw. U.L.R. 277 (1965) 60

D. Stanley, *Prisoners Among Us* (1976) 37

Steadman, *Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry* (1973) 1 J. Psychiatry & L. 409 46

Steadman & Cocozza, *We Can't Predict Who is Dangerous* (1975) 8 Psych. Today 32 46

A. von Hirsch & K. Hanrahan, *Abolish Parole?* (1978) 37

von Hirsch, *Prediction of Criminal Conduct and Preventative Confinement of Convicted Persons* (1971) 21 Buffalo L.Rev. 717 46

Wenk, Robinson & Smith, *Can Violence Be Predicted?* (1972) 18 Crime & Del. 393 46

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IN THE

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BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is reported at 85 Cal.App.3d 430, 149 Cal.Rptr. 519, and is set forth in the Appendix at page 38.

JURISDICTION

The opinion below of the Court of Appeal of the State of California, Fourth Appellate District, Division One was filed on September 22, 1978. On November 15, 1978, the California Supreme Court denied Appellants' Petition for Hearing. Appellants' Jurisdictional Statement was filed and docketed in this Court on February 14, 1979, and on May 21, 1979, this Court issued an order noting probable jurisdiction of this matter. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case further involves California Government Code section 845.8(a) which states:

> "Neither a public entity nor a public employee is liable for:
>
> "(a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release."

This case also involves section 1983 of Title 42, United States Code which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

I. Does the determination to parole a prisoner into society create civil damage liability on the part of state parole officials under 42 U.S.C. § 1983 where the parolee causes the death of a member of the general public?

II. Does the public entity and public employee immunity for injuries resulting from a determination to parole or release a prisoner, or from determining the terms and conditions of parole or release, or from determining whether to revoke parole or release embodied in California Government Code section

845.8(a), violate either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT

Appellees, due to embellishment of the facts by appellants in their "Statement Of The Case," and various inaccuracies contained therein, do not concur with the contents of appellants' "Statement Of The Case," and elect to submit this Statement.

This case involves a suit consisting of wrongful death and 42 U.S.C. § 1983 claims and seeks compensatory damages of $1 million and punitive damages of $1 million from the State of California and several of its parole officials based upon their determination to parole into society one Richard June Jordan Thomas (Thomas) who, approximately five months after he was released, took the life of Mary Ellen Martinez.

The state trial court sustained demurrers to the original complaint and a first amended complaint and dismissed the action. The California Court of Appeal, Fourth Appellate District, Division One, affirmed the judgment of dismissal, holding that the wrongful death causes of action were barred by the state tort immunity for a determination to parole a prisoner, contained in California Government Code section 845.8(a), and ruling that the 42 U.S.C. § 1983 cause of action was barred by an immunity for the quasi-judicial function of parole release. The California Supreme Court denied appellants a hearing. The Court noted probable jurisdiction on May 21, 1979.

Appellants are the parents, brother and sister of Mary Ellen Martinez, the victim of parolee Thomas (A. 2,20). Appellees are the State of California and its parole officials who, it is alleged, were at all relevant times engaged in performing duties for the California Adult Authority and the California Department of Corrections, and who released Thomas on parole.[1]/

In the first cause of action, appellants allege Thomas was found guilty of attempted rape upon two young females in 1969, certified as a mentally disordered sex offender not amenable to treatment, sentenced 1 - 20 years in state prison, and, after 5 years of imprisonment, came before appellees on his request for parole.

Appellants allege that with the knowledge of the foregoing facts combined with the knowledge that the court had made a recommendation of no parole for Thomas, that Thomas received no psychiatric treatment, and that Thomas expressed animosity and resentment towards his mother, appellees released Thomas on parole (A.4-5). In the first cause of action of both the original and first amended complaints, appellants

---

[1]/ In the original complaint, appellants incorporated by reference into all six causes of action the introductory allegation that appellees at all times mentioned in the complaint were engaged in performing duties for the California Adult Authority and the California Department of Corrections (A. 3-11). In the first amended complaint, wherein appellants were allowed to amend the first and sixth causes of action, appellants merely omitted this introductory allegation from those two causes of action and pleaded in conclusionary fashion that appellees did not parole Thomas within the course and scope of their employment because the "release of this assasin" was not "conduct that would or could be anticipated by the [State]." (A. 22-24, 29).

allege a theory of negligent release, and claim their *own* cause of action for the deprivation of care, comfort, support, protection and society of Mary Ellen Martinez (A. 6,24).

Appellants, in their "Statement Of The Case," present to the Court the following "facts" which were never alleged in either complaint:

> "THOMAS was paroled even though he admitted to authorities that he did not feel himself ready for parole and feared actions he might take if he in fact was paroled. THOMAS' parole was subject to special conditions. . . ." (Appellants' Br. 5).

Appellants allege in the second cause of action of the original and first amended complaints that the parole officials herein did not comply with certain requisite parole formalities, which appellants do not specify, and thereupon incorporate by reference earlier allegations of negligent release of Thomas (A. 6-7, 25).

The third cause of action of the original and first amended complaints alleges that the parole officials had a duty to warn females who might use the Tecolote Canyon area of Thomas' presence in the area and his violent propensities.[2]/ In their Statement Of The Case, appellants state their third cause of

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[2]/ At oral argument before the California Court of Appeal, counsel for appellants conceded that the third cause of action for negligent failure to warn females using Tecolote Canyon of the danger created by Thomas' release should be dismissed as there was no "continuing relationship" between the state and the victim, a condition precedent established by California case law for this type of tort (A. 41).

action alleges "parole officials negligently and *recklessly* failed to warn probable victims of their release of Thomas," (Appellants' Br. 6) whereas, in fact, the third cause of action alleges only carelessness and negligence regarding the alleged failure to warn (A. 9, 27).

The fourth cause of action of the original and first amended complaints alleges, in conclusionary language, without any supporting facts, appellee parole officials willfully, wantonly, and maliciously failed to supervise Thomas while he was on parole (A. 9, 27).

Appellants attempt, in the fifth cause of action of the original and first amended complaints, to set forth facts sufficient to state a claim under the Federal Civil Rights Act, 42 U.S.C. § 1983. Appellants allege that the parole officials at all relevant times were acting under color of state law, namely, California Penal Code sections 5075[3]/ and 5077.[4]/ Appellants, in an

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[3]/ California Penal Code section 5075 provides:

> "The Community Release Board shall be composed of nine members, each of whom shall be appointed by the Governor, with the advice and consent of the Senate, for a term of four years and until the appointment and qualification of his successor. Members shall be eligible for reappointment. Two of the original appointees shall be persons who were members of the Adult Authority immediately prior to July 1, 1977, and two shall be persons who were members of the Women's Board of Terms and Parole immediately prior to July 1, 1977.
>
> "The Chairman of the board shall be designated by the Governor from time to time. The chairman shall be the administrative head of the board and shall exercise all duties and functions necessary to insure that the responsibilities of the board are successfully discharged. He shall be the appointing

(Footnote 3 continued on page 8. Footnote 4 on page 8.)

attempt to identify a constitutional right protectable by 42 U.S.C. § 1983 allege they "have been deprived of the society, protection, services and support of Decedent, MARY ELLEN MARTINEZ." This allegation is preceded and followed by oblique references to the constitutional principle that a person cannot be deprived of life without due process of law (A. 10-11, 28-29).[5] In their Statement Of The Case, appellants state that

(Footnote 3 continued)

authority for all civil service positions of employment in the board.

"The terms of members shall expire as follows: two on March 15, 1978, two on March 15, 1979, two on March 15, 1980, and three on March 15, 1981. Successor members shall hold office for terms of four years, each term to commence on the expiration date of the term of the predecessor. The Governor shall fill every vacancy for the balance of the unexpired term. The selection of persons and their appointment by the Governor and confirmation by the Senate shall reflect as nearly as possible a cross-section of the racial, sexual, economic, and geographic features of the population of the state.

"It is the further intent of this section that the board shall adopt such policies and practices as will permit continuing operations and improvements without any further increase in the number of its members."

[4] California Penal Code section 5077 provides:

"The Community Release Board shall review all prisoners' requests for reconsideration of denial of good time credit, and setting of parole length or conditions, and shall have the authority to modify the previously made decisions of the Department of Corrections as to these matters. The revocation of parole shall be determined by the Community Release Board."

[5] It is, therefore, apparent that appellants were attempting to establish at the pleading stage their own cause of action for

(Footnote 5 continued on page 9.)

the fifth cause of action alleges the parole officials subjected Mary Ellen Martinez to deprivation of a fundamental constitutional right without due process (Appellants' Br. 6). However, as already pointed out, the "underlying right" pleaded in the fifth cause of action appears to be one which is allegedly vested personally in appellants, to wit, loss to them of comfort and society of Mary Ellen Martinez due to her death.

Appellants, in their brief (Appellants' Br. 14) state that the sixth cause of action, as well as the fifth, is for violation of the Federal Civil Rights Act. However, as the sixth cause of action was pleaded in the original and first amended complaints, it was never expressly set forth as a 42 U.S.C. § 1983 claim, as was the fifth cause of action (A. 10-13, 28-31). Further, it appears clear that the California Court of Appeal, rather than perceiving the sixth cause of action as a Federal Civil Rights claim, interpreted that cause of action to sound in negligent failure to revoke parole, supervise Thomas, and warn young females. The sixth cause of action alleges the parole officials willfully and maliciously failed to correct the negligent paroling of Thomas, failed to supervise Thomas, and failed to warn females using Tecolote Canyon of Thomas' presence or propensities (A. 11-13, 29-31).

(Footnote 5 continued)

deprivation of the society, comfort, etc., of Mary Ellen Martinez, as opposed to bringing a cause of action as personal representatives of the estate of Mary Ellen Martinez for the loss of her life, as was done by surviving family members in the Kent State disorders of 1970. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

SUMMARY OF ARGUMENT

Appellants, in bringing this 42 U.S.C. § 1983 action against these parole officials have not set forth facts sufficient to constitute a claim under that section as they have failed to identify a constitutional right cognizable under § 1983 and infringed by appellees, a necessary first step in any § 1983 action. *Baker v. McCollan*, ___ U.S. ___, 47 U.S.L.W. 4834 (1979). Although appellants allege the decision to release Thomas on parole violated Mary Ellen Martinez' right to life and deprived appellants of the comfort and society of Mary Ellen Martinez, it is clear appellants are merely substituting the tort element of causation for the requirement of identifying a constitutionally protected right under § 1983.

At the time these parole officials determined to release Thomas, it is clear the object and purpose of their act was the rehabilitation of this parolee, not the deprivation of any rights, constitutional or otherwise, of appellants or Mary Ellen Martinez. Any such right could not have been within the contemplation of appellees when Thomas was released. The loss of Mary Ellen Martinez' life resulted from the act of Thomas which in no conceivable fashion can be raised to the level of state action. Appellants' effort to transmute the violent conduct of Thomas into state action must fail in the absence of allegations of conspiracy or agency between appellees and Thomas. To condone such an attempt would enlarge the boundaries of § 1983 to encompass all acts of recidivistic crime committed by parolees or probationers.

The California Court of Appeal correctly held that absolute immunity protects parole officials from § 1983 liability where the propriety or wisdom of the release of a parolee is

questioned. During the past sixty years the parole process has become an integral part of the penological system. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). The institution of parole is still, therefore, in an experimental stage. *Greenholtz v. Nebraska Penal Inmates*, ___ U.S. ___, 47 U.S.L.W. 4581, 4583 (1979). The prevailing view of those federal and state courts deciding the question has been that parole officials are absolutely immune from § 1983 liability for their determinations to release inmates on parole.

The Court, in *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) expanded the absolute immunity of judges from § 1983 liability to prosecutors for a number of important policy considerations including the recognition that § 1983 liability would have a chilling effect on the decision-making aspect of the prosecutorial function in our criminal justice system. *Id.*, at 425. Parole officials also play a vital quasi-judicial role in our criminal-penological system of justice and, for many of the same policy considerations identified by the Court in extending immunity to prosecutors, should also be extended absolute immunity from § 1983 liability. The wrath, loss and emotion of victims of recidivistic crime may easily be converted into the ascription of reckless and improper actions to the parole official. Unsupported allegations of malice, recklessness and gross negligence in connection with a parole release are easily made and, in the absence of absolute immunity, can be disproven only by evidentiary trial involving an inquiry into the circumstances and motivations of parole officials' decisions. Requiring a parole official to defend such a decision, perhaps years after it has been made, would impose intolerable burdens upon the official and, therefore, on the rehabilitative process.

Further, the prospect of a lay jury determining issues such as the motivations and circumstances surrounding a parole official's decision to release a prisoner, psychiatric indications and contraindications for parole of a prisoner, predictive capabilities of antisocial behavior of a prisoner (a subject now believed by many authorities to be beyond any meaningful predictive capability) and other esoteric matters, is to be avoided. To expect a jury to determine such issues in the context of a standard of gross negligence, or recklessness, would be a hopeless task and impose a chilling effect on the decision-making process of parole officials.

Such a chilling effect on a parole decision-making process would have drastic consequences upon the potential of deserving inmates to obtain release on parole. The absence of absolute immunity for parole officials would also disserve the interest society has in treating the parolee with basic fairness. *See Morrissey v. Brewer, supra,* 408 U.S. 471, 484.

Imposition of a qualified immunity would be an inferior remedy when the availability of alternative means to help ensure the integrity of the parole decision process exists. For example, discretion of parole officials to release inmates on parole can be reduced, input from law enforcement agencies and the public within the context of particular paroles can be encouraged, parole officials can be quickly removed from office for incompetence, and it is within the purview of a state to enact some form of reparations system for victims of crime, including recidivistic acts of violence.

Appellees submit that appellants' complaint, when shorn of improper conclusionary pleading is reduced to a claim of simple negligence for poor professional judgment. Without expressly

holding negligence is an insufficient basis to state a claim under § 1983, the implications of this Court's decisions and the prevailing view among the Federal Circuits is that § 1983 liability based upon negligence would subvert the historical intent of Congress in enacting the Ku Klux Klan Act of 1871 and render the courts a font of tort law.

The California Court of Appeal correctly held that California Government Code section 845.8(a), granting immunity to a parole official for determination to release a prisoner, does not violate constitutional due process or equal protection. The immunity statute does not involve any "fundamental rights," but is merely part and parcel of California's regulation of the nature and scope of, and procedure for, governmental tort liability. The statute involves no "suspect classification that would call for strict scrutiny standards." When the constitutionality of the immunity statute is decided on the principle of whether it is "rationally based" and "rationally related to the achievement" of "legitimate" governmental interests or objectives, it is clear that California Government Code section 845.8(a) must be upheld. The policies served by the immunity doctrine for parole officials are the same as the interests which underlie immunity for prosecutors and judges, *i.e.*, ensuring that parole officials' energies are not deflected from their duties in the rehabilitation process, and helping to guarantee that these officials will be able to exercise their independence of judgment required by their office unfettered by any fear of tort liability. These underlying interests were identified by the California Legislature in its adoption of the immunity statute and provide an adequate basis for upholding the section as against appellants' constitutional challenge.

ARGUMENT

I.

AT THE THRESHOLD, APPELLANTS HAVE NOT SET FORTH FACTS SUFFICIENT TO CONSTITUTE A CLAIM UNDER 42 U.S.C. § 1983

The Court recently, in *Baker v. McCollan, supra,* ____ U.S. ____, 47 U.S.L.W. 4834 (1979), reiterated a very basic principle concerning *any* 42 U.S.C. § 1983 suit:

> "In any event, before the relationship between the defendant's state of mind and his liability under § 1983 can be meaningfully explored it is necessary to isolate the precise constitutional violation with which he is charged. For § 1983 imposes civil liability only upon one
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> > 'who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities *secured by the Constitution and laws*. . . .' 42 U.S.C. § 1983.
>
> The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' "

The Court hastened to observe that identification of a constitutional right allegedly infringed in a particular case is a necessary and incipient step in a § 1983 suit. *Baker v. McCollan,*

supra, ____ U.S. ____, 47 U.S.L.W. 4834, 4836. Cf., *Paul v. Davis,* 424 U.S. 693, 700-701 (1976). Analysis of this necessary first step process here demonstrates that appellants have failed to state a claim under § 1983.

A. Appellees Have Not Deprived Mary Ellen Martinez Or Appellants Of Any Constitutional Or Other Right Cognizable Under 42 U.S.C. § 1983

The legislative history of § 1983 demonstrates that it was intended to "[create] a species of tort liability" in favor of persons who are deprived of "rights, privileges or immunities secured" to them by the Constitution. *Carey v. Piphus,* 435 U.S. 247, 253 (1978); *Imbler v. Pachtman, supra,* 424 U.S. 409, 417 (1976); *Mitchum v. Foster,* 407 U.S. 225, 238-242 (1972); *Monroe v. Pape,* 365 U.S. 167, 172-183 (1961).

Appellants have obliquely alleged the parole officials' determination to release Thomas on parole resulted in the loss of Mary Ellen Martinez' life, a right secured by the Constitution, and thereby deprived appellants of the care, society, comfort, and protection of Mary Ellen Martinez. Appellants, neither in their complaint nor in their brief satisfy the mandate of *Paul v. Davis, supra,* 424 U.S. 693, 700-701 (1976) and *Baker v. McCollan, supra,* ____ U.S. ____, 47 U.S.L.W. 4834 (1979), of identification of a constitutional right cognizable under § 1983 and allegedly infringed by appellees.

It cannot be gainsaid that *life* itself is a fundamental constitutional right cognizable under § 1983. Cf., *Scheuer v. Rhodes, supra,* 416 U.S. 232 (1974). Indeed, the Court, in view of the history and purpose of the Civil Rights Act as a means of

redress for deprivations of constitutional rights, has observed that lower federal courts have interpreted 42 U.S.C. § 1988 to fill the gap in § 1983 caused by the death of a victim by authorizing adoption of state survival statutes. *Moor v. County of Alameda*, 411 U.S. 693, 702-703, n. 14 (1973).[6]/

Appellants, however, rather than having brought this suit in their representative capacities, are apparently attempting to allege their own constitutional deprivation as a result of their loss of the deceased's society, care, comfort, etc. The Court has never recognized a parent's loss of a child's comfort and support to be a constitutional right cognizable under § 1983,[7]/ and were this case to seriously tender for consideration that issue, appellees would certainly oppose such a disturbing and unprecedented prospect.[8]/

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[6]/ See *Mattis v. Schnarr*, 502 F.2d 588, 590-593 (CA8 1974); *Spence v. Staras*, 507 F.2d 554 (CA7 1974); *Hall v. Wooten*, 506 F.2d 564 (CA6 1974); *Brazier v. Cherry*, 293 F.2d 401 (CA5 1961), *cert. denied*, 368 U.S. 921; *Pritchard v. Smith*, 289 F.2d 153 (CA8 1961). California has also recognized this policy. *Alvarez v. Wiley*, 71 Cal.App.3d 599, 604, 139 Cal.Rptr. 550 (1974).

[7]/ Appellees are mindful that a few lower federal courts have recognized a constitutional right to parenthood cognizable under § 1983. *E.g., Mattis v. Schnarr, supra*, 502 F.2d 588, 593-595 (CA8 1974); *Jones v. McElroy*, 429 F.Supp. 848, 852-853 (E.D. Pa. 1977), but question whether loss of parenthood is to be equated with loss of comfort and support.

[8]/ If loss of a child's comfort and support is perceived to be a cognizable right under § 1983, it would be illogical to condition such recovery upon the death of a child, especially in cases where serious injury to a child resulted in loss of comfort or society or in emotional distress on the part of a parent. See *Carey v. Piphus, supra*, 435 U.S. 247, 254-255 (1978). Such a prospect would render the Fourteenth Amendment a font of tort law, a prospect to be clearly avoided. *Paul v. Davis, supra*, 424 U.S. 693, 700-701 (1976).

Appellees submit that this case, however, does not include either the unquestioned constitutional right to life or a "right" of parenthood as neither of these rights were in any manner adversely affected at the time appellees released Thomas. Appellees submit the question of whether a particular defendant has acted in derogation of a constitutional right cognizable under § 1983 must be determined as of the point in time the defendant acted. The holding and underlying rationale of the Court in *Wood v. Strickland*, 420 U.S. 308, 322 (1975) clearly presupposes such an analysis:

> "To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permisible intentions, but also on *knowledge of the basic, unquestioned constitutional rights of his charges*. Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damage under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the *student affected*, or if

> he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are 'charged with predicting the future course of constitutional law.' *Pierson v. Ray*, 386 U.S., at 557. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of *the student's clearly established constitutional rights* that his action cannot reasonably be characterized as being in good faith." (Emphasis added.)

The opinion of the Court in *Wood* presupposes that the salutary purpose of the Civil Rights Act of deterence of repression of constitutionally protected rights is fairly served by insisting upon, *at the time a defendant acts*, (1) an ascertainable person or group of people subject to the defendant's conduct, and (2) knowledge, actual or constructive, of deprivation of a clearly established constitutional right. In virtually every § 1983 case decided by the Court actual or potential liability has been based upon a defendant acting vis-a-vis an identifiable person, or persons, often the subject of an official decision, and in contemplation of an ascertainable constitutional right of the person(s). *E.g., O'Connor v. Donaldson*, 422 U.S. 563, 576-577 (1975); *Scheuer v. Rhodes, supra*, 416 U.S. 232, 248-250 (1974). *See also Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 389, 390 (1971); *Monroe v. Pape, supra*, 365 U.S. 167, 169 (1961).

At the time the parole officials made their determination to release Thomas on parole no right of Mary Ellen Martinez or appellants cognizable under § 1983 was in any way infringed or

adversely affected. At the time of Thomas' parole neither appellants nor Mary Ellen Martinez was within the contemplation of the parole officials. It was not until approximately five months after Thomas' release that the parolee contacted the deceased in Tecolote Canyon, a time at which appellants concede there was no relationship between the state and the victim. Appellants' position presupposes that whenever loss of life occurs and there is a factual causal connection between conduct of a public official and the death there results a *constitutional* deprivation of life. This argument has already been rejected by the Court.[9/]

[9/] Such an attempt to transmute loss of life into a § 1983 action by virtue of official action involved in the causation chain has been rejected by the Court in *Paul v. Davis, supra*, 424 U.S. 693, 698-699 (1976):

> "If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under § 1983. And since it is surely far more clear from the language of the Fourteenth Amendment that 'life' is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under § 1983.
>
> "It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent."

Appellants refusal to identify a constitutionally protected right under § 1983 infringed at the time the parole officials released Thomas cannot be mere inadvertence, but rather a tacit admission that no such right existed in favor of appellants or Mary Ellen Martinez. Appellants have not alleged Mary Ellen Martinez had a constitutional right, as a general member of the public, to be free from risk of injury inflicted by a parolee or free from any form of contact with parolees. Appellants have not argued they or Mary Ellen Martinez had a constitutional right to attend Thomas' parole hearing, present evidence, or argue against Thomas' release. Appellants have never taken the position these parole officials had a constitutional duty to appellants or Mary Ellen Martinez, as members of the public, to deny Thomas parole. Finally, appellants would apparently not claim a § 1983 violation had Thomas been released upon completion of a maximum sentence with the same result befalling Mary Ellen Martinez. In effect, however, as shown *infra*, under California's Determinate Sentencing Law, the Adult Authority's power was to determine sentence by virtue of granting parole.

Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care created by tort law. *Baker v. McCollan, supra,* ____ U.S. ____, 47 U.S.L.W. 4834 (1979). Appellees submit this case can be "parsed with relative ease" (*Id.*, at 4836) by appellants' failure to specifically identify any constitutional right allegedly infringed in this case.

B. Appellees Did Not Act Under Color Of State Law To Deprive Mary Ellen Martinez Or Appellants Of Any Right Cognizable Under 42 U.S.C. § 1983

The basic purpose of § 1983 is to allow redress for the deprivation of constitutional rights by any "person [acting] under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory. . . ."[10] *See Carey v. Piphus, supra,* 435 U.S. 247, 253-254 (1978); *Monroe v. Pape, surpa,* 365 U.S. 167, 187-192 (1960). State action or color of state law is essential to a § 1983 action. *Adickes v. Kress & Co.,* 398 U.S. 144 (1970); *Sykes v. State of California (Dept. of Motor Vehicles),* 497 F.2d 197, 200 (CA9 1974). Involvement of a private party in a conspiracy with a state official to deprive another of a constitutional right will also subject the private party to liability under § 1983. *United States v. Price,* 383 U.S. 787, 794 (1966). These parole officials, however, did not act to deprive appellants or Mary Ellen Martinez of any constitutional right cognizable under § 1983.[11] Nor is it alleged that appellees conspired in any fashion with Thomas, a private party, to take the life of Mary Ellen Martinez. Rather, the conduct which deprived Mary Ellen Martinez of her life was that of a private party, Thomas, who did not act in concert with or as an agent of appellees. Appellants' effort to transmute the violent private conduct of Thomas into state action must fail in the absence of

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[10] Appellants, although they have named the State of California as a defendant have correctly elected not to allege or argue that the State of California is liable under § 1983. *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 280 (1977); *Edelman v. Jordan,* 415 U.S. 651 (1974); *Quern v. Jordan,* 47 U.S.L.W. 4241 (1979).

[11] See Part 1A of Brief of Appellees.

allegations of conspiracy or agency between appellees and Thomas. To condone such an attempt would enlarge the boundaries of § 1983 to encompass all acts of recidivistic crime committed by parolees or probationers.

II.

THE LEGAL HISTORY AND POLICY INTERESTS UNDERLYING 42 U.S.C. § 1983, THE IMMUNITY DOCTRINE, AND THE PAROLE SYSTEM, SUPPORT THE PRINCIPLE OF ABSOLUTE IMMUNITY FOR PAROLE OFFICIALS IN CONNECTION WITH A DETERMINATION TO PAROLE A PRISONER

> "During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. . . . [P]urpose [of parole] is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison."[12] *Morrissey v. Brewer, supra,* 408 U.S. 471, 477 (1972).

As Mr. Chief Justice Burger recently observed in writing the opinion of the Court in *Greenholtz v. Nebraska Penal Inmates, supra,* ___ U.S. ___, 47 U.S.L.W. 4581, 4583 (1979):

> "Indeed the very institution of parole is still in an experiemental stage. In parole releases, like its

12/ See *Parole Revocation in the Federal System,* 56 Geo. L.J. 705 (1968).

> siblings probation release and institutional rehabilitation, few certaintities exist. In each case, the decision differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community. . . . This latter conclusion requires the Board to assess whether, in light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others and undermine respect for the administration of justice. The entire inquiry is, in a sense, an 'equity' type of judgment that cannot always be articulated in traditional findings." (Footnote omitted.)

The California Court of Appeal held below that parole officials serving this vital function as amplified above are immune from liability under § 1983. Analysis of "the immunity historically accorded the relevant official at common law and the interests behind it," *Imbler v. Pachtman, supra,* 424 U.S. 409, 421 (1976), demonstrates that the California Court of Appeal's decision is correct and should be affirmed.

A. The History Of The Immunity Docrine, And The Parole System, Support The Principle Of Absolute Immunity For Parole Officials In Connection With A Determination To Parole A Prisoner

It has long been the practice of the Court, in rendering decisions on § 1983 immunities, to enter into a considered inquiry into the immunity historically accorded the relevant official at common law and policy interests behind it. *Imbler v. Pachtman, surpa,* 424 U.S. 409, 421 (1976); *Butz v. Economou,* 438 U.S. 478, at 508.

The common law immunity of judges for acts committed in their judicial jurisdiction was found by the Court to be preserved in a § 1983 action in *Pierson v. Ray,* 386 U.S. 547, 554-555 (1967).[13/] This immunity had been accepted by the courts of this

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13/ The Court described the judicial immunity as follows:

> "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher,* 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences.' (*Scott v. Stansfield* L.R.3Ex. 220, 223 (1868), quoted in *Bradley v. Fisher, supra,* 349, note, at 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." 386 U.S. 547, 553-554.

country, including this Court, in the 18th and 19th centuries,[14/] and has been followed consistently through the present day. See *Butz v. Economou, supra,* 438 U.S. 478, 508-517 (1978) (immunity of administrative law judges); *accord, Stump v. Sparkman,* 435 U.S. 349 (1978).

A similar rationale has been employed by the courts in extending absolute immunity to prosecutors. From the close of the 19th Century, a majority of state courts held that prosecutors were absolutely immune from suits for malicious prosecution.[15/] This Court has consistently upheld the doctrine of absolute immunity for prosecutors. *Yaselli v. Goff,* 275 U.S. 503 (1927) (*Per Curiam*), *affirming* 12 F.2d 396 (CA2 1927). In *Imbler v. Pachtman, supra,* 424 U.S. 409 (1976), the Court extended the absolute immunity to a prosecutor sued under § 1983 and charged with knowing use of false testimony and suppression of evidence, basing its holding upon "the same considerations that underlie common-law immunities of judges. . . ." 424 U.S. at 422-423. As the Court in *Imbler* explained:

> "It is the *functional comparability* of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well." 424 U.S. 409, at 423, n. 20. (Emphasis added.)

14/ See, *e.g., Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 (1872); *Yates v. Lansing,* 5 Johns. 282 (N.Y. 1810); *Ross v. Rittenhouse,* 2 Dall. 160 (Pa. 1792).

15/ For citation of early cases see *Imbler v. Pachtman, supra,* 424 U.S. at 422, n. 19.

Scrutiny of the functional nature of the activity under consideration in a § 1983 case has been an important element for the Court's determination of whether immunity will apply, especially where the complained of activity has been wholly or partially quasi-judicial in nature. *See, e.g., Imbler v. Pachtman, supra,* 424 U.S. at 430; *Butz v. Economou, supra,* 438 U.S. at 509, 511-513; *Lake Country Estates v. Tahoe Reg. Planning,* ___ U.S. ___, 47 U.S.L.W. 4256, 4260 (1979).

It has been the functional comparability of various judgments and activities to those of the judge which have prompted the courts to extend the quasi-judicial absolute immunity to other participants who fulfill an important governmental function in the judicial process, such as grand jurors,[16] court clerks,[17] court reporters,[18] and bar association members participating in disciplinary proceedings.[19]

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[16] See *Butz v. Economou, supra,* 438 U.S. at 509-511; *Imbler v. Pachtman, supra,* 424 U.S. at 423, n. 20; *Floyd v. Barker,* 12 Coke 23, 77 Eng. Rep. 1305 (1608); *Turpen v. Booth,* 56 Cal. 65 (1880); *Hunder v. Mathis,* 40 Ind. 356 (1872).

[17] *See e.g., Stewart v. Minnick,* 409 F.2d 826 (CA9 1969); *Rhodes v. Meyer,* 334 F.2d 709 (CA8 1964), *cert. denied,* 379 U.S. 915 (1964); *Pritt v. Johnson,* 264 F.Supp. 167 (M.D. Pa. 1967); *Ginsberg v. Stern,* 125 F.Supp. 596 (W.D. Pa. 1954), *aff'd.,* 225 F.2d 245 (CA3 1955). *Contra, McCray v. Maryland,* 456 F.2d 1 (CA4 1972) (ministerial functions).

[18] *See, e.g., Dieu v. Norton,* 411 F.2d 761 (CA7 1969); *Morrow v. Ingleburger,* 67 F.R.D. 675, 689 (S.D. Ohio 1974); *Brown v. Charles,* 309 F.Supp. 817, 817-818 (E.D. Wis. 1970); *United States ex rel. Johnson v. Specter,* 262 F.Supp. 113 (E.D. Pa. 1967).

[19] *See, e.g., Kissell v. Breskow,* 579 F.2d 425, 428-430 (CA7 1978); *Clark v. State of Washington,* 366 F.2d 678, 681 (CA9 1966); *Moity v. Louisiana State Bar Ass'n.,* 414 F.Supp. 180, 183-184, n. 17 (E.D. La. 1976), *aff'd.,* 537 F.2d 1141 (CA5 1976); *Kremer v. Stewart,* 378 F.Supp. 1195, 1197, 119 (E.D. Pa. 1974).

The parole decision, described by the Court in *Greenholtz v. Nebraska Penal Inmates, supra,* ___ U.S. ___, 47 U.S.L.W. 4581, 4585 (1979), as "much like a sentencing judge's choice," has been identified by the great majority of courts deciding the issue as another quasi-judicial function for which the quasi-judicial absolute immunity applies in a § 1983 action. *See also Gagnon v. Scarpelli,* 411 U.S. 778, 787-788 (1973). The Ninth Circuit has consistently held, in § 1983 actions brought by inmates, state parole officials perform quasi-judicial functions in processing applications for parole and approving parole work or probation and are absolutely immune from liability for damages under § 1983. *See Burkes v. Callion,* 433 F.2d 318 (CA9 1970), *cert. denied,* 403 U.S. 908; *Allison v. California Adult Authority,* 419 F.2d 822 (CA9 1969); *Villalobos v. Dickson,* 406 F.2d 835 (CA9 1969); *Silver v. Dickson,* 403 F.2d 642 (CA9 1968), *cert. denied,* 394 U.S. 990.

The Fourth Circuit has also held parole officials are absolutely immune from liability in a § 1983 action for a decision regarding parole status. *Douglas v. Muncy,* 570 F.2d 499 (CA4 1978);[20] *Pope v. Chew,* 521 F.2d 400 (CA4 1975), as has the Third Circuit, *Thompson v. Burke,* 556 F.2d 231 (CA3 1977), the Fifth Circuit, *Johnson v. Wells,* 566 F.2d 1016 (CA5 1978), *Cruz v. Skelton,* 502 F.2d 1101 (CA5 1974), the Sixth Circuit, *Joyce v. Gilligan,* 383 F.Supp. 1028 (N.D. Ohio 1974), *affirmed without opinion,* 510 F.2d 973 (CA6 1975) and numerous federal district courts. *Garvey v. Casson,* 423 F.Supp. 68 (D.C.

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[20] *Douglas v. Muncy* also held a parole officer who allegedly arbitrarily enforces conditions of parole is likewise immune. 570 F.2d at 501.

Del. 1976); *Bricker v. Michigan Parole Bd.*, 405 F.Supp. 1340 (E.D. Mich. 1975); *Reiff v. Commonwealth of Pennsylvania*, 397 F.Supp. 345 (E.D. Pa. 1975);[21] *Fitzgerald v. Procunier*, 393 F.Supp. 335 (N.D. Cal. 1975); *Myers v. Bendus*, 343 F.Supp. 370 (E.D. Pa. 1971); *United States ex rel. Pope v. Williams*, 326 F.Supp. 279 (E.D. Pa. 1971); *Brown v. State of Pennsylvania, etc.*, 311 F.Supp. 1176 (E.D. Pa. 1970); *Robinson v. Largent*, 311 F.Supp. 1032 (E.D. Pa. 1970); *Paige v. Pennsylvania Board of Parole*, 311 F.Supp. 940 (E.D. Pa. 1970).

Rather than tendering for the Court's consideration any analysis of the judicial history of the quasi-judicial immunity for parole decisions of parole officials from § 1983 liability, appellants and Amicus, Americans For Effective Law Enforcement,[22] cite two cases (*Grimm v. Arizona Bd. of Pardons & Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977), and *Semler v. Psychiatric Institute of Washington, D.C.*, 538 F.2d 121 (CA4 1976), *cert. denied*, 429 U.S. 827 (1977)), which are of little consequence to the issue of absolute immunity for a parole official from § 1983 liability for a determination to release an inmate on parole.

In *Grimm*, the surviving parents of a man killed by a released parolee brought a wrongful death action[23] against Arizona

[21] *Reiff v. Commonwealth of Pennsylvania* also holds a parole officer is immune from § 1983 liability for discretionary activity. 397 F.Supp. at 348.

[22] *See* Brief of Appellants, pp. 12-13, 33-35; Brief, Amicus Curiae, of Americans For Effective Law Enforcement, Inc., pp. 6-14.

[23] Two other plaintiffs joined in the action for personal injuries sustained by the hand of the parolee.

parole officials who had released the parolee, alleging grossly negligent and reckless release. The action was based upon Arizona law, and did not include any claim under § 1983. The majority of the Arizona Supreme Court, in a three-two split, selected this case as a vehicle to abolish the Arizona judicially created doctrine of absolute immunity for the discretionary activities of administrative officials. (564 P.2d at 1233.) In reaching its holding that members of the State Board of Pardons and Paroles owed a duty to the general public to avoid grossly negligent or reckless release of a highly dangerous prisoner (564 P.2d at 1234), the *Grimm* majority engaged in an attack against "[t]he authority wielded by so-called faceless bureaucrats . . ." (564 P.2d at 1233), totally ignored the consensus and wisdom of the courts of this country that the decision to release an inmate on parole is a quasi-judicial function for which absolute immunity attaches, and decided the immunity question not on the basis of the functional nature of the decision to parole, but in reaction to the power of a parole official being reposed in the administrative branch of government.[24]

It comes as no surprise, therefore, that the majority opinion in *Grimm* is mocked by the dissent,[25] expressly rejected by the

[24] Thus the "functional comparability" approach preferred by the Court (*Imbler v. Pachtman, supra*, 424 U.S. at 422-423, 430; *Butz v. Economou, supra*, 438 U.S. at 509, 511-513) is spurned.

[25] "Beware, oh unsuspecting trial judge, that when your decision to place a felon on probation goes horribly awry, the majority of my brothers sitting in cloistered ivory tower call your action gross and subject you to the consequences thereof. I hasten to concede that the majority opinion does not say this but logic tells

(Footnote 25 continued on page 30.)

Supreme Court of Minnesota (*Papenhausen v. Schoen*, ___ Minn. ___, 268 N.W.2d 565 (1978)), and has not been followed in § 1983 cases brought by members of the general public against parole officials for death or injury inflicted by a released parolee. *Pate v. Alabama Bd. of Pardons and Paroles*, 409 F.Supp. 478 (M.D. Ala. 1976), *aff'd without opinion*, 548 F.2d 354 (CA5 1977); *Reiff v. Commonwealth of Pennsylvania, supra*, 397 F.Supp. 345 (E.D. Pa. 1975).

In *Papenhausen v. Schoen, supra*, ___ Minn. ___, 268 N.W.2d 565 (1978), members of the parole board of Minnesota granted one Dion a "medical parole" from a penal institution where he had been incarcerated to an "open hospital" providing freedom of movement. Dion "escaped" from the open facility and assaulted and raped plaintiffs' daughter. Plaintiffs alleged Dion had been 'unlawfully, carelessly, unreasonably, negligently or . . . intentionally transferred from the reformatory to the state hospital." (268 N.W.2d at 567.) In a unanimous opinion of the Minnesota Supreme Court, the result in *Grimm v. Arizona Bd. of Pardons & Paroles, supra*, 115 Ariz. 260, 564 P.2d 1227 (1977), was expressly rejected:

> "In this case, the defendant parole board members argue that the nature of their duties epitomizes a discretionary governmental

(Footnote 25 continued)

me that the discretionary acts of the parole board need no less protection than those of the sentencing judge. There may be boards or commissions, bastions of bureaucracy, which should not be accorded the protection of quasi-judicial immunity, but the parole board is hardly one of these." (564 P.2d at 1237.)

> activity. We agree. The performance of their duties requires each member of the board to personally evaluate a body of data and make a discretionary judgment based on that evaluation. . . . Similarly, we find it impossible to term Dr. Romero's position 'ministerial' under the foregoing definitions. As the medical chief of the Vail unit at the state hospital, Dr. Romero was charged with the responsibility for evaluating the patients' problems and treatment. The selection and monitoring of treatment programs, based on the personal examination of patients and their files, is in our opinion an indisputably discretionary activity, involving as it does the application of skilled judgment to a wide variety of human conditions. See, *Linder v. Foster*, 209 Minn. 43, 295 N.W. 299 (1940). We are thus unpersuaded by plaintiffs' suggestion that the activities of these defendants were merely ministerial and not protected by the doctrine of discretionary immunity.
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> ". . . .
>
> "Plaintiffs next urge us to follow the lead of the Arizona Supreme Court in *Grimm v. Arizona Bd. of Pardons & Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977).
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> "While it may be that the standard of care enunciated in *Grimm* is not unduly burdensome for public officials, we find it unnecessary to resolve that question in this case. Even if this court were to impose a more stringent standard of care on discretionary officials, the outcome of the present case would be unaffected. There is nothing in the record before us to indicate that

these defendants were negligent, let alone reckless. From the uncontroverted affidavits, it appears that Dion was friendly, eager to cooperate, and manifested no signs of dangerous propensities. Accordingly, we decline to judicially expand the tort liability of public servants as did the Arizona court." 268 N.W.2d at 571-573. (Footnote omitted.)

In *Reiff v. Commonwealth of Pennsylvania, supra,* 397 F.Supp. 345 (E.D. Pa. 1975), a minor and her parents all brought § 1983 actions against, *inter alia,* Pennsylvania parole board members alleging negligent release and supervision of a parolee with known dangerous propensities who shot and injured the minor plaintiff during the course of a robbery. The court applied the absolute quasi-judicial immunity to bar liability on the part of the parole officials and a parole officer:

"The complaint as amended against the individual defendants must be dismissed. The complaint as amended seeks damages from them based upon discretionary acts within their official capacities. Defendants Boor, Butler, Conley, Jefferson, Burke, Tartler and Miller are members and officials of the Pennsylvania Board of Probation and Parole and, as such, they are immune from suit for damage under § 1983 when, as in this case, it is alleged that they acted within the scope of their authority and in their official capacities. The law is clear that such officials are immune from suit for damages under § 1983 in the performance of discretionary duties within the framework of a quasi-judicial process. [Citations omitted.]

"Similarly, defendant Carol Attwood is immune from suit for damages under § 1983 since it is alleged that she acted within the scope of her authority and in her official capacity thereby acting as a parole officer performing discretionary duties within the framework of a quasi-judicial process. [Citations omitted.]" 397 F.Supp. at 348.

Pate v. Alabama Bd. of Pardons and Paroles, supra, 409 F.Supp. 478 (M.D. Ala. 1976), *aff'd without opinion,* 548 F.2d 354 (CA5 1977), involved facts similar to this case. Plaintiff's minor daughter was raped and killed by an Alabama parolee. Plaintiff brought a § 1983 action against members of the parole board alleging negligence, and reckless wilfullness and wantonness in connection with the release of the parolee and subsequent supervision. The court rendered the following analysis and holding:

"The complaint herein alleges, not only negligence but also, reckless willfulness and wantonness. There is dictum in some lower court cases that an allegation of bad faith, coupled with a substantial showing thereof, might strip parole officials of their immunity for acts committed in the course of their duties. *Joyce v. Gilligan,* 383 F.Supp. 1028 (ND Ohio, 1974), affm'd. without opinion 510 F.2d (6th Cir. 1975). Upon consideration of the reasons supporting immunity, however, this Court concludes that parole officials should be protected by the same absolute immunity afforded judges for acts resulting from the performance of their official duties.

"Parole officials bear a more than ordinary responsibility because of the dangerous traits already demonstrated by those with whom they must deal. This responsibility imposes far greater moral burdens and requires far more difficult legal choices than those met by the average administrative officer. The function of the Parole Board is more nearly akin to that of a judge in imposing sentence and granting or denying probation than it is to that of an executive administration of criminal justice that those who determine whether an individual shall remain incarcerated or be set free should do so without concern over possible personal liability at law for such criminal acts as some parolee will inevitably commit; in other words, that such officials should be able to exercise independent judgment without pressure of personal liability for acts of the subject of their deliberations. . . .

"It is the judgment of this Court that Defendants Robinson, Ussery, Lambert and the Board of Pardons and Paroles are absolutely immune from suit for damages under 42 U.S.C. § 1983. The Court would note the recent decision of the United States Supreme Court, extending such absolute immunity even to public prosecutors, *Imbler v. Pachtman*, ____ U.S. ____, 96 S.Ct. 984, 47 L.Ed.2d 128, 44 U.S. Law Week 4250 (1976), as evidencing support for the general line of reasoning herein adopted." (409 F.Supp. at 479.) (Footnote omitted.)

Amicus Americans For Effective Law Enforcement, in support of appellants, cite *Semler v. Psychiatric Institute of Washington, D.C., supra*, 538 F.2d 121 (CA4 1976) as laying

down the "proper guidelines"[26] for this case.[27] In *Semler* the parents of a girl killed by a probationer brought a negligence action bsed on Virginia common law against a psychiatric institute which had charge of the probationer pursuant to court order, a treating physician, a professional group of psychiatrists, and a Virginia probation officer who was involved with the release of the probationer from the type of confinement ordered by the court without the judge approving the probationer's change in status or being notified of the change. The court, relying on general principles of tort law, held that, although Virginia law would bar liability for the probation officer's discretionary acts, the complained of conduct was ministerial in nature, negligent, and not entitled to immunity. (538 F.2d at 127.)

Semler did not: (1) involve a § 1983 action; (2) place in issue the quasi-judicial decision of probation and terms thereof; (3) abolish or modify the Virginia common law immunity applicable for the discretionary activities of a probation officer; or (4) in any manner modify or even question the Fourth Circuit's acceptance of absolute quasi-judicial immunity from § 1983

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[26] Brief, Amicus Curiae, of Americans For Effective Law Enforcement, Inc., In Support of Appellants, p. 10.

[27] *Semler*, inapposite to the issues of this case, has not even been cited by appellants.

liability for a parole official's decision regarding parole status.[28] [29]

The short judicial history set forth above has been rather consistent in upholding an absolute quasi-judicial immunity from § 1983 liability for a parole official's determination to release a prisoner. It must now be analyzed whether "consideration of public policy . . . likewise countenances absolute immunity under § 1983." *Imbler v. Pachtman, supra,* 424 U.S. at 424.

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[28] *Douglas v. Muncy, supra,* 570 F.2d 499 (CA4 1978); *Pope v. Chew, supra,* 521 F.2d 400 (CA4 1975).

[29] *Semler's* irrelevance is further underscored by the fact that appellants (1) elected not to sue any parole agent of Thomas under § 1983 for alleged negligence in connection with ministerial aspects of supervision, and (2) devote no part of that portion of their brief dealing with § 1983 liability to any issue other than whether a parole official's reckless or grossly negligent release of a parolee triggers § 1983 liability. Nevertheless, because the gist of appellants' § 1983 claim is, when stripped of conclusionary pleading, simple negligence based on alleged poor judgment in Thomas' release, and inasmuch as appellants have technically incorporated by reference into their § 1983 claim (fifth cause of action) allegations of negligent parole supervision of their third cause of action, appellees will analyze, *infra,* the issue of whether simple negligence can give rise to § 1983 liability, a question appellees believe is "fairly comprised" within the issues tendered for the Court's consideration. This Court's Rule 23(1)(c).

B. The Policy Interests Underlying 42 U.S.C. § 1983, The Immunity Doctrine, And The Parole System, Support The Principle Of Absolute Immunity For Parole Officials In Connection With A Determination To Parole A Prisoner

In addition to the judicial precedents discussed above, strong policy interests support the absolute immunity doctrine which the courts have recognized for parole officials' decisions with respect to parole status. While parole officials perform different functions than do judges and prosecutors, just as judges and prosecutors themselves have different responsibilities, similar policies support the principle of absolute immunity for each of these government-sponsored participants in our criminal-penological justice system.

1. The California Parole System At The Time Of Thomas' Parole

A state may establish a system of parole although it has no duty to do so. *Greenholtz v. Nebraska Penal Inmates, supra,* 47 U.S.L.W. 4581, at 4583. The parole system may be flexible in defining conditions of release and factors to be considered by the parole authority to insure the "public interest purposes of rehabilitation and deterrence, . . ."[30] Generally, parole statutes vest "very broad discretion in [a parole board] . . ." (*Id.,* at 4583), in the hope that, "The objective of rehabilitating

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[30] *See Greenholtz,* at 4853. *See also* A. von Hirsch & K. Hanrahan, *Abolish Parole?* (1978); N. Morris, *The Future of Imprisonment* 47 (1974); J. Wilson, *Thinking About Crime* 171 (1975); D. Stanley, *Prisoners Among Us* 59, 76 (1976); Dawson, *The Decison to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice,* 1966 Wash. U.L.Q. 243, 249.

convicted persons to be useful, law-abiding members of society can remain a goal no matter how disappointing the progress." *Id.*, at 4584.

At the time of Thomas' release on parole in 1975, California endeavored to meet the challenges and purposes of parole, enumerated above, pursuant to the command of the Indeterminate Sentence Law,[31]/ California Penal Code section 1168, which then provided in relevant part:

> "Every person convicted of a public offense, for which imprisonment in any reformatory or state prison is now prescribed by law shall, unless such convicted person be placed on probation, a new trial granted, or the imposing of sentence suspended, be sentenced to be imprisoned in a state prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment. [ ] . . ."

Responsibility for determining the actual length of time for the statutory maxima and minima (Former California Penal Code section 3023)[32]/ the convicted person was to serve in prison and/or on parole was vested in the California Adult Authority (Former California Penal Code section 5075),[33]/ which could

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31/ In 1977 California adopted a Determinate Sentencing Law (Cal. Pen. Code §§ 1170-1170.6) reducing discretion of parole officials to determine parole eligibility.

32/ Former California Penal Code section 3023:

"The term of imprisonment shall not exceed the maximum or be less than the minimum term of imprisonment provided by law for the public offense of which such person was convicted."

33/ *See* footnote 3, *supra*.

"determine and redetermine, after the commencement of imprisonment, what length of time, if any, such person shall be confined" (Former California Penal Code section 3020),[34]/ and which had "the power to allow prisoners imprisoned in the state prisons to go upon parole outside the prison walls and inclosures." (Former California Penal Code section 3040.)[35]/ A practice evolved in which "customarily a term [was] fixed only in conjunction with a grant of parole."[36]/

The California Supreme Court clearly enunciated the principles, purposes, and objects of the California Parole system in effect at the time of Thomas' parole in *In re Minnis*, 7 Cal.3d 639, 644-645, 102 Cal.Rptr. 749, 498 P.2d 997 (1972):

> "This court has explained that 'the purpose of the *indeterminate sentence law*, like other modern laws in relation to the administration of the criminal law, is to mitigate the punishment

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34/ Former California Penal Code section 3020:

"In the case of all persons heretofore or hereafter sentenced under the provisions of Section 1168 of this code, the Adult Authority may determine and redetermine, after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned, unless the sentence be sooner terminated by commutation or pardon by the Governor of the State."

35/ Former California Penal Code section 3040:

"The Adult Authority shall have the power to allow prisoners imprisoned in the state prisons to go upon parole outside the prison walls and inclosures. The authority may parole prisoners in the state prisons to camps for paroled prisoners established under Article 5, Chapter 5, Title 1, Part 3 of this code."

36/ *In re Rodriguez*, 14 Cal.3d 639, 646, 122 Cal.Rptr. 552, 537 P.2d 384 (1975).

which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. They endeavor to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing.' (*In re Lee* (1918) 177 Cal. 690, 692 [171 P. 958]; italics added. See also *Williams v. New York* (1949) 337 U.S. 241, 247-248 [93 L.Ed. 1337, 1342-1343, 69 S.Ct. 1079].) 'In the general field of criminal law the Legislature has abandoned the ancient notion of categorical punishment, the infliction of fixed terms for certain crimes, and substituted the indeterminate sentence, leaving to the Adult Authority the judgment of the period of incarceration. *The Authority does not fix that period pursuant to a formula of punishment, but in accordance with the adjustment and social rehabilitation of the individual* analyzed as a human composite of intellectual, emotional and genetic factors.' (*People v. Morse* (1964) 60 Cal.2d 631, 642-643 [36 Cal.Rptr. 201, 388 P.2d 33, 12 A.L.R.3d 810]; italics added; fns. omitted.)

"We have similarly stated that '[t]he purpose and object of a *parole system* is to mitigate the rigor of the old [penitentiary system] and . . . to provide a more humane management and prison discipline under which there is extended to those who may show a disposition to reform and whose reformation may reasonably be expected, a hope and prospect of liberation from the prison walls under the restrictions and

conditions of a parole. . . . [T]he interests of society require that under prison discipline every effort should be made to produce a reformation of the prisoner. . . . The legislative policy [was to provide a system whereby] a hope was to be held out to prisoners that through good conduct in prison and a disposition shown toward reformation, they might be permitted a conditional liberty upon restraint under which they might be restored again to society. . . ." (*Roberts v. Duffy* (1914) 167 Cal. 629, 634 [140 P. 260]; italics added; see also *People v. Morse, supra,* 60 Cal.2d 631, 642-643, fn. 9; *People v. Denne* (1956) 141 Cal.App.2d 499, 507-508 [297 P.2d 451].) The goals of the parole system can best be achieved by 'the liberation of a prisoner on parole at the earliest period when permitted by law and when *on a consideration of the merits of each individual case,* parole ought, in the judgment of the board, to be granted.' (*Roberts v. Duffy, supra,* at p. 637; italics added.)

"Many factors are to be considered by the Authority in deciding whether to fix a sentence at less than maximum and whether to grant parole. Although 'good conduct while incarcerated and potential for reform are not the only relevant factors, . . . this court has acknowledged their significance. (*In re Schoengarth* (1967) 66 Cal.2d 295, 300 [57 Cal.Rptr. 600, 425 P.2d 200]; *Roberts v. Duffy, supra,* 167 Cal. 629, 640.) Furthermore, the Authority has declared that these factors are among those of 'paramount importance.' (Cal. Adult Authority, Principles, Policies and Program (1952) pp. 8-9; see also Adult

Authority Policy Statement No. 11 (June 27, 1966).) Any official or board vested with discretion is under an obligation to consider *all* relevant factors (cf. *People v. Wade* (1959) 53 Cal.2d 322, 338-339 [1 Cal.Rptr. 683, 348 P.2d 116]), and the Authority cannot, consistently with its obligation, ignore postconviction factors unless directed to do so by the Legislature." (Footnote omitted.)

2. The Unique Status Of Parole Officials In The Criminal-Penological System Justifies Absolute Quasi-Judicial Immunity

The recognition by the court decisions, cited in Part IIA of the Brief of Appellees, that absolute immunity applies to parole officials has explicitly rested, in large measure, on the policies and interests supporting absolute immunity from § 1983 liability for judges and prosecutors.

The Court, in *Imbler v. Pachtman, supra,* 424 U.S. 409, 427 (1976), expanded the absolute immunity of judges from § 1983 liability recognized in *Pierson v. Ray, supra,* 386 U.S. 547, 554-555 (1967), to prosecutors, an immunity the prosecutor had already enjoyed at common law. A number of important policy considerations support the holding of *Imbler,* including the recognition that § 1983 liability would have a chilling effect on the decision-making aspect of the prosecutorial function in our criminal justice system. *Id.,* at 425. Parole officials also play a vital quasi-judicial role in our criminal-penological system of justice. *Greenholtz v. Nebraska Penal Inmates, supra,* ____ U.S. ____, 47 U.S.L.W. 4581, 4583 (1979); *Gagnon v. Scarpelli, supra,* 411 U.S. 778, 787-788. The very function of the parole

official in the criminal-penological system "often invites a common-law tort action." *Imbler v. Pachtman, supra,* 424 U.S. at 421. As the Court has held with respect to judges and prosecutors, the intense feelings and significant interests at stake in a criminal trial are likely to produce a losing party who will "accept anything but the soundness of the decision as explanation" of the outcome. *Butz v. Economou, supra,* 438 U.S. at 509; *Bradley v. Fisher, supra,* 80 U.S. at 348. Just as the role of the prosecutor is likely to produce "with some frequency retaliatory suits by angry defendants," *Butz, supra,* 438 U.S. at 510, so the wrath, loss and emotion of victims[37] of recidivistic crime may easily be converted into the ascription of reckless and improper actions to the parole official.[38]

As in the present case, unsupported allegations of malicious, reckless, and grossly negligent release are easily leveled against parole officials, and, in the absence of absolute immunity which would defeat such a suit at the outset, could be disproven only by evidentiary trial which would entail inquiry into the circumstances and motivations of the parole officials' actions. *Imbler v. Pachtman, supra,* 409 U.S. at 419, n. 13. *See also Scheuer v. Rhodes, supra,* 416 U.S. 232, 238-239; *Wood v. Strickland,*

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[37] Including heirs of persons victimized by homicide committed by parolees.

[38] With due respect to appellants' tragic loss, appellees submit there is no greater evidence of the emotional nature of § 1983 suits against parole officials than appellants' embellishment of facts in their Statement Of The Case and their reference to Thomas as an "assassin." (A. 24.)

supra, 420 U.S. 308, 320-322 (1975).[39]/ Any such trial, in the absence of absolute immunity, would, as in the case of the prosecutor, involve, "[d]efending these decisions, often years after they were made, [and] could impose unique and intolerable burdens. . . ." upon a parole official responsible annually for hundreds of paroles.[40]/ *Imbler v. Pachtman, supra*, at 425-426; cf. *Bradley v. Fisher, supra*, 13 Wall., at 348; *Pierson v. Ray, supra*, 386 U.S. at 554.

Imbler v. Pachtman, supra at 425, recognized that § 1983 suits surviving the pleadings would subject honest prosecutors

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[39]/ The prospect of such an unwarranted trial calls into play the admonition contained in the concurring and dissenting opinion of Mr. Justice Rehnquist in *Butz v. Economou, supra*, 438 U.S. at 522:

> "But if we allow a mere allegation of unconstitutionality, obviously unproved at the time made, to require a Cabinet-level official, charged with the enforcement of the responsibilities to which the complaint pertains, to lay aside his duties and defend such an action on the merits, the defense of official immunity will have been abolished in fact if not in form. The ease with which a constitutinal claim may be pleaded in a case such as this, where a violation of statutory or judicial limits on agency action may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment, will assure that. The fact that the claim fails when put to trial will not prevent the consumption of time, effort, and money on the part of the defendant official in defending his actions on the merits. The result can only be damage to the 'interests of the people,' *Spalding, supra*, at 498, which 'require[s] that due protection be accorded to [Cabinet officials] in respect to their official acts."

[40]/ Every year in California, over 13,000 persons are released from prisons and jails on parole. Additionally, 152,242 adults and 55,859 juveniles were on probation by the end of 1976 statewide. *Future of Probation Project Report*, Foundation for Continuing Education in Corrections (January 12, 1979).

to difficult lawsuits wherein resolution of technical issues relating to evidence and strategy would be by lay jury determination. As the Court avoided such a prospect for the prosecutor, the prospect of a lay jury determining issues such as motivations and circumstances surrounding a parole official's decision to release a parolee, psychiatric indications and contra-indications for parole of a prisoner, predictive capabilities of anti-social behavior of a prisoner, conduct and character traits of a prisoner, etc., is also to be avoided, especially given the possible temptation for juries to "reduce" crime by applying pressure on the parole system in the form of liability verdicts against parole officials.

The Court has questioned the wisdom of permitting the courts, and presumably juries, to handle certain types of questions raised by § 1983 litigation and immunity. See *Butz v. Economou, supra*, 438 U.S. at 503. It would appear that the judicial and legislative branches have already delegated the parole aspect of the penological process to parole officials trained in the disciplines most intimately involved with parole. As the Court has pointed out, "No ideal, error-free way to make parole release decisions has been developed; the whole question has been and will continue to be the subject of experimentations involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole decision makers in predicting future behavior." *Greenholtz v. Nebraska Penal Inmates, supra*, 47 U.S.L.W. 4581, 4584. Even though the parole decision is "predictive and discretionary," *Morrissey v. Brewer, supra*, 408 U.S. at 480, courts and commentators have acknowledged that the predictive capabilities of future behavior, including violence,

both within and without the context of parole, are limited.[41] As Justice Douglas cogently stated:

> "Predictions of dangerous behavior, no matter who makes them, are incredibly inaccurate, and there is a growing consensus that psychiatrists are not uniquely qualified to predict dangerous behavior and are, in fact, less accurate in their

[41] *Greenholtz v. Nebraska Penal Inmates, supra,* 47 U.S.L.W. 4581, 4584. A representative sample of the copious outpouring of articles by psychiatrists and psychologists on these topics would include: Diamond, *The Psychiatric Prediction f Dangerousness* (1975) 123 U.Pa.L.Rev. 439; Monahan, *The Prevention of Violence, in Community Mental Health and the Criminal Justice System* (Monahan edit. 1975). Stead & Cocozza, *We Can't Predict Who is Dangerous* (1975) 8 Psych. Today 32; Steadman, *Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry* (1973) 1 J. Psychiatry & L. 409; Rubin, *Prediction of Dangerousness in Mentally Ill Criminals* (1972) 27 Archives of Gen. Psychiatry 397; Wenk, Robison & Smith, *Can Violence be Predicted?* (1972) 18 Crime. & Del. 393.

The principal recent articles in this field by legal writers, reporting generally on the foregoing studies and their juridical implications, are: Ennis & Litwack, *Psychiatry, and the Presumption of Expertise: Flipping Coins in the Courtroom,* (1974) 62 Cal. L.Rev. 693 at pp. 711-734; von Hirsch, *Prediction of Criminal Conduct and Preventative Confinement of Convicted Persons* (1971) 21 Buffalo L. Rev. 717; Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions* (1970) 23 J. Legal Ed. 24, 42-47; Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways* (1968) 4 Trial 29; Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment* (1968) 117 U.Pa.L.Rev. 75, 81-85; *Developments In The Law--Civil Commitment of the Mentally Ill* (1974) 87 Harv. L.Rev. 1190, 1240-1245.

> predictions than other professionals."[42] *Murel v. Baltimore City Criminal Court,* 407 U.S. 355, 364-365, fn. 2 (1972).

[42] "Justice Douglas' quotation is from testimony of Bruce J. Ennis, staff attorney of the New York Civil Liberties Union, given before the Subcommittee on Constitutional Rights of the United States Senate Committee on the Judiciary. Mr. Ennis is an experienced practitioner in the field of psychiatry and the law, and has authored such works as Legal Rights of the Mentally Handicapped (1973), Rights of Mental Patients (1973), and Prisoners of Psychiatry: Mental Patients, Psychiatrists, and the Law (1972). In the latter book Mr. Ennis states (at p. 227), 'In a well-known New York study, psychiatrists predicted that 989 persons were so dangerous that they could not be kept even in civil mental hospitals, but would have to be kept in maximum security hospitals run by the Department of Corrections. Then, because of a United States Supreme Court decision [Baxstrom v. Herold (1966) 383 U.S. 107], those persons were transferred to civil hospitals. After a year, the Department of Mental Hygiene reported that one-fifth of them had been discharged to the community, and over half had agreed to remain as voluntary patients. During the year, only 7 of the 989 committed or threatened any act that was sufficiently dangerous to require retransfer to the maximum security hospital. Seven correct predictions out of almost a thousand is not a very impressive record.

"'Other studies, and there are many, have reached the same conclusion: psychiatrists simply cannot predict dangerous behavior. They are wrong more often than they are right. And they always err by overpredicting dangerous behavior.'

"A number of reports on the consequences of the *Baxstrom* experience have been published, e.g., by Henry J. Steadman of the New York State Department of Mental Hygiene. Although the figures vary somewhat according to the duration of the post-release period considered, the overall results remain constant: only a very small proportion of the allegedly dangerous patients committed subsequent acts of violence." *See People v. Burnick,* 14 Cal.3d 306, 328, fn. 18; 121 Cal.Rptr. 488, 535 P.2d 352 (1975).

To permit juries to decide whether parole releases are made recklessly or in gross negligence, hopeless standards as shown above, given (1) the impossible task of predicting future violence and (2) "the recognition that with many [parolees] there is a risk that they will not be able to live in society without committing additional anti-social acts," (*Morrissey, supra,* 408 U.S. 471, 483 (1972)), will toll the beginning of the end of the parole system. As the Court admonished in *Greenholtz v. Nebraska Penal Inmates,* ___ U.S. ___, 47 U.S.L.W. 4581, 4585: "If parole determinations are encumbered by procedures that states regard as burdensome and unwarranted, they may abandon or curtail parole."

Qualified immunity for a parole official would have drastic consequences upon the potential of deserving inmates to obtain release on parole. The Court has observed that qualified immunity for a prosecutor in § 1983 suits "would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution." *Imbler v. Pachtman, supra,* 424 U.S. at 424. Appellees submit that, likewise, qualified immunity for a parole official would undermine performance of his duties no less than would the threat of common-law suits for negligence. *Imbler,* at 426, fn. 24, recognized that qualified immunity for a prosecutor makes him "reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages." Similarly, qualified immunity for a parole official would have a chilling effect on parole decisions in close cases and in cases where the prospective parolee had been incarcerated for a sex offense or other crime of violence.

The Court has observed:

> "And society has a further interest in treating the parolee with basic fairness: fair treatment in parole [decisions] will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." (*Morrissey v. Brewer, supra,* 408 U.S. 471, at 484.)

In addition to the prejudice qualified immunity[43] would inflict upon parole officials and penal inmates, society generally

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[43] Although the precedents and policy arguments reviewed require a rule of absolute immunity for parole officials' determinations to grant parole, affirmance of the decision below would be appropriate here even under a qualified immunity rule. The Court has held that even where absolute immunity may be inappropriate, qualified immunity should be granted a number of different types of officials. See, *e.g., Scheuer v. Rhodes, supra,* 416 U.S. 232, at 240; *Butz v. Economou, supra,* 438 U.S. 478, at 497; *Wood v. Strickland, supra,* 420 U.S. 308. Appellants at least concede parole officials are entitled to qualified immunity, and the rulings of these cases are at least equally applicable to parole officials, since the threat of liability would significantly interfere with their willingness and ability to perform their crucial public functions, "with the decisiveness and the judgment required by the public good." *Scheuer, supra,* at 240. Immunity from liability for "good-faith, nonmalicious action taken to fulfill their official duties" is thus justified for parole officials. *Wood, supra,* at 318.

In this case, it is clear that even such qualified immunity would require dismissal of appellants' complaint. As the California Court of Appeal indicated, there were no factual allegations of malice in the complaint, only unsupported conclusionary ascriptions to appellees of malice. It would be absurd to suggest that appellees intended death or injury to a member of the public upon the release of Thomas, or that they knew such would occur. Appellants do not allege such even

(Footnote 43 continued on page 50.)

would be disserved by withholding absolute immunity. It is clear that parole has become an integral part of our criminal-penological justice system:

> "Government statistics reveal that substantially less than one-third of all first-time federal offenders are held in prison until mandatory release. . . . In addition, 88% of the judges responding to a recent survey stated that they considered the availability of parole when imposing sentence, and 47% acknowledged their expectation that defendants would be released on parole when imposing sentence, and 47% acknowledged their expectation that defendants would be released on parole after serving one-third of their sentences. . . . In accord with these views, the Administrative Conference of the United States has advised Congress that courts set maximum sentences anticipating 'that a prisoner who demonstrates his desire for rehabilitation will not serve the maximum term or anything approaching the maximum.' . . . And in discussing the sentencing provisions of the proposed revision of the federal criminal

(Footnote 43 continued)

though they had two opportunities to do so. Further, neither Mary Ellen Martinez nor appellants were the "charges" of appellees when Thomas was released, and it is clear, the parole officials had knowledge of any adverse affect on "unquestioned constitutional rights" of these people at such time. *Wood, supra,* at 322. Given that no clearly established constitutional rights have even been identified by the Court for a member of the general public arising out of a decision to grant an inmate parole, appellees are not liable under § 1983. *Procunier v. Navarette,* 434 U.S. 555, 565-566 (1978).

> code, S. 1437, the Senate Judiciary Committee observed:
>
> "'A federal judge who today believes that an offender should serve four years in prison may impose a sentence in the vicinity of ten years, knowing that the offender is eligible for parole release after one third of the sentence.' S. Rep. No. 95-605, 95th Cong., 1st. Sess., 1169.
>
> "Thus, experience in the federal system has led both judges and legislators to expect that inmates will be paroled substantially before their sentences expire. Insofar as it is critical under the Court's due process analysis, this understanding would certainly justify a similar expectation on the part of the federal inmates." (Dissent of Mr. Justice Marshall, *Greenholtz v. Nebraska Penal Inmates, supra,* 47 U.S.L.W. 4581 (1979). (Footnotes omitted.)

As the Court observed in *Morrissey v. Brewer, supra,* 408 U.S. 471, at 484:

> "The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law."

The interests of parole officials,[44/] inmates, and society will best be served by affording absolute immunity to parole

[44/] To the extent liability of parole officers under § 1983 has been tendered to the court by the allegations in the complaint, even though the question is not addressed by appellants in their Brief, it is clear that due to the relationship between a parole officer and a parolee, absolute

(Footnote 44 continued on page 52.)

officials in § 1983 suits for determinations to grant parole. The underlying rationale for this immunity was never more eloquently articulated than by Judge Learned Hand in *Gregoire v. Biddle,* 177 F.2d 579, 581 (CA2 1949):

> "The justification for [immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen

(Footnote 44 continued)

immunity is required. In *Gagnon v. Scarpelli, supra,* 411 U.S. 778, at 783-786, the Court recognized the duty of the parole officer to the welfare of his client, the parolee, and the parole officer's function "to supervise a course of rehabilitation," for which, "[the parole officer] has been entrusted traditionally with broad discretion. . . ." The Court also recognized that if the parole officer's purpose was converted into a prosecutor, "his role as counsellor to the probationer or parolee is then surely compromised." The Court in *Morrissey v. Brewer, supra,* 408 U.S. at 478-479, recognized that "The parole officers are part of the administrative system designed to assist parolees and to offer them guidance." To impose § 1983 liability on parole officers for the acts of recidivism of their charges would result in transforming the process of counselling and assistance to an enforcement and prosecutorial function. The process of rehabilitation would surely be subverted by such liability.

Finally, appellants apparently accept the wisdom of applying the same type of § 1983 liability analysis to a determination not to revoke parole as that which exists for the original determination to release an inmate on parole. The Court has recognized the overlapping characteristics which inhere in both decisions. *E.g., Greenholtz v. Nebraska Penal Inmates, supra,* 47 U.S.L.W. 4581, at 4583

> the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . ."

3. Available Alternatives To 42 U.S.C. § 1983 Liability Of Parole Officials

In addition to the historical and policy arguments discussed above, the availability of alternative means to help ensure the integrity of the parole decision process support the doctrine of absolute immunity for parole officials. *See Imbler v. Pachtman, supra,* 424 U.S. at 427 (discussing alternatives to § 1983 liability of prosecutor).

If the claim be that a particular system of parole vests excessive discretionary authority in parole officials to fix parole dates and/or determine durations of sentence, it is within the power of a legislative body to reduce the discretion of parole

officials much as California did in 1977 when it adopted the Determinate Sentencing Law (California Penal Code sections 1170-1170.6). Such an alternative permits individual states to experiment with the rehabilitative process and achieve a balance between the goals of prisoner rehabilitation and the protection of society. Such an alternative is clearly superior to the imposition of § 1983 liability upon parole officials for recidivistic crime committed by parolees. Next, it is certainly within the discretion of a state to permit the court, prosecutor, defense counsel, and law enforcement agencies that investigated a particular case to file statements of their views of the inmate with the parole body. In fact, this was the case in California, by virtue of Penal Code section 1203.01,[45] in the form in which it

[45] California Penal Code section 1203.01 provided prior to its 1977 amendment:

> "Immediately after judgment has been pronounced, the judge and the district attorney, respectively, shall cause to be filed with the clerk of the court a brief statement of their views respecting the person convicted or sentenced and the crime committed, together with such reports as the probation officer may have made relative to the prisoner. The attorney for the defendant and the law enforcement agency that investigated the case may likewise file with the clerk of the court statements of their views respecting the defendant and the crime of which he was convicted. Forthwith after the filing of such statements and reports, the clerk of the court shall mail a copy thereof, certified by such clerk, with postage thereon prepaid, addressed to the Department of Corrections at the prison or other institution to which the person convicted is delivered. The clerk shall also mail a copy of any statement submitted by the court, district attorney, or law enforcement agency, pursuant to this section, with postage thereon prepaid, addressed to the attorney for the defendant, if any, and to the defendant in care of the Department of Corrections, and a copy of any statement submitted by the attorney for the defendant, with postage thereon prepaid, shall be mailed to the district attorney."

existed at the time Thomas was released. Next, it is within the discretion of a state to permit attendance of visitors and observers at parole hearings, even though such persons may not be permitted to oppose a specific determination or act as advocates for a particular inmate. California had such a policy in existence at the time of Thomas' release, pursuant to the Adult Authority Policy Statement # 3.[46]

Another alternative to § 1983 liability is the creation of public opposition to a proposed parole and the willingness of a parole body to recognize the problem of "improvident" parole releases as indicated by such public opposition. Such an alternative was recognized in the case of *In re Fain*, 65 Cal.App.3d 376, 135 Cal.Rptr. 543 (1976). In *In re Fain*, the California Court of Appeal held the trial court erroneously concluded that a decision granting a prisoner parole had become so terminally "final," once it had been recommended and approved that the Adult Authority subsequently lost its inherent power to reconsider the action in the sense that its jurisdiction had lapsed. The court further held that under a rule setting out as a "ground" on which a parole recision may be based any "new information" indicating that parole should not occur, the Adult Authority's awareness of the public outrage at the prospect of the prisoner's release from prison was such "new information," and was an appropriate ground for holding a recision hearing.

Although the office of a parole official is appointive, rather than elective, it is within the power and discretion of the appointing executive official to replace a parole official for incompetence and/or an inability to implement the purposes

[46] *See* attached Appendix.

and functions of a parole system without unnecessarily exposing the general public to unreasonable risks of harm. One advantage of the parole official being appointed rather than elected is that the public will not have to suffer incompetent and/or ultra vires action until the next election. Rather, the appointing power, subject to the electoral process, will be able to remove such an official immediately upon cause.

Finally, it is within the purview of a state to enact some form of reparations system for victims of crime, including recidivistic acts of violence. At the time of Thomas' release, already in existence was California's Victims of Crime Act[47]/ providing, pursuant to public interest, indemnification and assistance in the rehabilitation of those residents of the State of California who as a direct result of violent crime suffer pecuniary loss.

Appellees submit that the foregoing alternatives are clearly superior to § 1983 liability on the part of parole officials and will permit individual states and the United States government to experiment with the parole process so that maximum opportunities for rehabilitation can be achieved while the prospect of harm to members of the general public is minimized and/or compensated for.

47/ California Government Code sections 13959, et seq. *See* attached Appendix.

III.

NEGLIGENCE IS NOT A PROPER BASIS FOR RELIEF UNDER 42 U.S.C. § 1983

This Court has never ruled on the question of whether "simple negligence" can give rise to § 1983 liability, expressly deferring the issue in two recent decisions. *Baker v. McCollan, supra,* 47 U.S.L.W. 4834, 4835 (1979); *Procunier v. Navarette, supra,* 434 U.S. 555, 566, fn. 14. Appellees submit that portion of appellants' complaint alleging intentional and/or malicious conduct is a tissue of conclusionary pleading which should be given no weight in the review of this case,[48]/ that the complaint can, therefore, be reduced to a claim of simple negligence (poor judgment in releasing Thomas) on the part of these parole officials, and that, therefore, the issue of "simple negligence" is

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48/ The courts have uniformly held that conclusions of law and/or unwarranted deductions of fact are not admitted. *See, e.g., Newport News Co. v. Schauffler,* 303 U.S. 54, 57 (1938); *Sherman v. Yakahi,* 549 F.2d 1287, 1290 (CA9 1977); *Nickens v. White,* 536 F.2d 802, 803 (CA8 1976) (although civil rights pleading should be liberally construed it must nonetheless not be conclusionary); *Koch v. Yunich,* 533 F.2d 80, 85-86 (CA2 1976) (civil rights complaints must contain specific allegations of fact indicating a deprivation of civil rights, rather than state simple conclusions); *Curtis v. Everette,* 489 F.2d 516, 521 (CA3 1973), *cert. denied,* 416 U.S. 995 (1974), (conclusionary allegations, such as "intentionally, wilfully and recklessly," without supporting facts are not sufficient to make out a complaint under 42 U.S.C. § 1983); *Finley v. Rittenhouse,* 416 F.2d 1186, 1187 (CA9 1969). This rule of pleading has been particularly emphasized with respect to § 1983 actions brought against parole officials for determinations of parole status. *Williams v. Dunbar,* 377 F.2d 505, 506 (CA9 1967); *Richardson v. Rivers,* 335 F.2d 996, 999 (CA D.C. 1964).

once again tendered for the Court's consideration as being fairly comprised within the questions involved in this appeal. The Court's Rule 23(1)(c).

In order to state a claim cognizable under § 1983, a plaintiff must show (1) that public officials have intentionally deprived him of a right secured by the federal constitution and (2) that such deprivation was effected under state law. *Paul v. Davis, supra,* 424 U.S. 693, 696-697 (1976).

In *Monroe v. Pape, supra,* 365 U.S. 167, 187 (1961), the Court dispensed with any need for a showing that a public official being sued under § 1983 had *specifically* intended to violate a plaintiff's constitutional rights.[49]/ In stating that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," *Monroe* was referring to its own facts showing intentional conduct by police officers so flagrant that they were bound to know it would, as a "natural consequence," deprive plaintiffs of their constitutional rights.[50]/ So viewed, *Monroe* is entirely consistent with the Court's present standard articulated in a series of recent decisions that public officials are liable under § 1983 only if they act intentionally either with malicious

[49]/ Of course negligent conduct was not at issue and was not considered by the Court in *Monroe*. However, *Monroe* did not dispense with the need to show that the conduct engaged in was intentional.

[50]/ *See,* McCormack, *Federalism and Section 1983,* 60 Va. L.R. 1, 54-55 (1974); *see also* 2 Devitt and Blackmar, *Fed. Jury Proc. & Prac.,* 177 (Intent--defined), 156 (Negligence--defined), 285-290 (Civil Rights cases).

intent to cause a deprivation of rights or with deliberate indifference to "clearly established" rights of which they know or reasonably should have known. Negligent conduct is not within such a formulation.

A. Congress Intended To Impose Liability For Intentional Conduct Only

"Any analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted." *District of Columbia v. Carter,* 409 U.S. 418, 425 (1973), *rehearing denied,* 410 U.S. 959. The controlling concern of the proponents of the legislation was the wave of violence and terror perpetrated by the Ku Klux Klan against both blacks and their white sympathizers. *Id.* However, equally important was the legislator's concern for the inaction of the state and local governments to control the situation.[51]/ *Id.,* at 426. For example, Representative James A. Garfield of Ohio, the future President, noted that the problem was not that state laws were inadequate, "but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection. . . ."[52]/

As one commentator has noted:

[51]/ *See Chapman v. Houston Welfare Rights Organization,* ____ U.S. ____, 47 U.S.L.W. 4528, 4531, fn. 25 (1979).

[52]/ Cong. Globe, 42nd Cong., 1st Sess. 390 (1871), Appendix 153.

> "The debates thus lay bare the background of the bill: Outlaws whipping, robbing and murdering with the tacit complicity (if not the active conspiracy) of those responsible for the enforcement of local police regulations."[53]/

Thus, the conduct for which the Ku Klux Klan Act was to provide a remedy was intentional conduct, of the type classified either as crimes or intentional torts, which resulted in the deprivation of a fourteenth amendment right. Nothing in the history or statutory language itself refers to negligence in any form.[54]/

Neither does the use of the word "neglect" in the Act import negligence. The word is used only in § 1986 and not in § 1983.[55]/ Its meaning in § 1986 was explained by Representative Burchard of Illinois who said liability attached only when "secret combinations of men are *allowed* by the Executive to band together to deprive one class of citizens of their legal rights

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53/ Shapo, *Constitutional Tort: Monroe v. Pape and Beyond*, 60 Nw. U.L.R. 277, 281 (1965).

54/ Negligence has been considered a separate tort since 1825 (W. Prosser, *Law of Torts*, p. 140 (4th ed. 1971), well before adoption of § 1983.

55/ The specific inclusion of the term "neglect" in § 1986, but not in § 1983, was deliberate and evinces a congressional intent to limit § 1983 to affirmative intentional conduct. (*Compare Monroe v. Pape* (365 U.S. at 187) considering the omission of the word "wilfully" in § 1983.) Such intentional conduct includes a refusal to act upon a request to perform a clear duty. The "deliberate indifference" of *Estelle v. Gamble*, 429 U.S. 97 (1976), seems to center about the refusal to act, rather than the erroneous exercise of professional judgment as is allegedly involved in this case. *Id.*, at 104, fn. 10.

without a proper effort to discover, detect and punish the violations of law and order." Cong. Globe, 42d Cong., 1st Sess., App. 315 (emphasis added). Thus, § 1986 imposes liability on a ". . . person who, having knowledge . . . and having power to prevent or aid in preventing . . . *neglects* . . . . so to do. . . ." (Emphasis added.) Liability under § 1986 requires an unwillingness to act in the face of actual knowledge. *See, Hampton v. City of Chicago*, 484 F.2d 602, 610 (7CA 1973) *cert. denied*, 415 U.S. 917 (1974). This is wanton conduct, not mere negligence.

It is clear then that only intentional conduct was meant to be proscribed by the enactment of § 1983.

B. This Court's Decisions Confine § 1983 To Intentional Conduct

In *Monroe v. Pape, supra*, 365 U.S. 167, the Court did not dispense with the need to allege a general intent to engage in conduct which results in a constitutional deprivation and certainly did not hold that negligent conduct which produced such a result was actionable. The conduct alleged in *Monroe* was purely intentional, flagrantly so. Further, in *Monroe*, the Court indicated that it was concerned with "an official's *abuse of his position*." 365 U.S. at 172 (emphasis added).[56]/

56/ In his dissenting opinion in *Paul v. Davis, supra*, 424 U.S. 693, 717, Mr. Justice Brennan quotes the above language from *Monroe* with the same emphasis, but leaves open the question "whether or not mere negligent official conduct in the course of duty can ever constitute such abuse of power." In discussing tort claims against public officials generally, Professor Louis D. Jaffe has stated: "Our central concern is the control of official power. . . . This means, for one

(Footnote 56 continued on page 62.)

The subsequent recognition of a qualified immunity for police officers in *Pierson v. Ray, supra,* 386 U.S. 547, based on good faith demonstrates that intentional conduct was the focus of § 1983, for two reasons. First, the alleged conduct in *Pierson* was intentional. 386 U.S. at 555-557. Second, the assertion of subjective good faith as a matter of common sense is addressed solely to intentional conduct or deliberate omission. Under *Pierson*, the officer also had to act pursuant to a reasonable belief to assert good faith. This objective element of the immunity standard cannot co-exist with negligence, which by definition, is unreasonable behavior because "[i]n the light of the recognizable risk, the conduct, to be negligent, must be unreasonable. . . ." Prosser, *Law of Torts,* 146 (4th ed. 1971).

After *Pierson* came *District of Columbia v. Carter, supra,* 409 U.S. 418. There, the Court reversed a Court of Appeals' decision which included *dicta* that a public official might be liable in negligence under § 1983. *Carter v. Carlson,* 447 F.2d 358, 365 (CA D.C. 1971). This Court reversed on other grounds, but stated: [W]e intimate no view on the merits of respondent's claims insofar as they are "predicated on other theories of liability." 409 U.S. at 420, fn. 3.

Then, in rapid succession, came *Wood v. Strickland, supra,* 420 U.S. 308, *Rizzo v. Goode,* 423 U.S. 362 (1976), *Paul v. Davis, supra,* 424 U.S. 693, *Estelle v. Gamble, supra,* 429 U.S. 97, and *Procunier v. Navarette, supra,* 434 U.S. 555.

(Footnote 56 continued)

thing that our emphasis will be on deliberated rather than negligent conduct, on misuse of power rather than inadvertent miscalculation." Jaffe, *Suits Against Governments and Officers: Damage Actions,* 77 Harv. L.R. 209 (1963).

In *Wood* (420 U.S. 308 (1975)),[57] this Court gave definition and content to the qualified immunity afforded public officials in *Pierson v. Ray* and in *Scheuer v. Rhodes*. The court stated that a public official had a qualified immunity for good faith conduct and became liable for damages under § 1983 only when he acted either with "malicious intent" to cause a deprivation of constitutional rights or in disregard of "clearly established" constitutional rights of which he knew or reasonably should have known. 420 U.S. at 322. This liability attaches only when settled, unquestioned constitutional rights are involved of ascertainable persons affected by the conduct in question. *Id.*

Less than one year after *Wood,* the court decided *Rizzo v. Goode, supra.* There, the plaintiffs sought an injunction under § 1983 to impose a constitutional duty on supervisory city officials for failing to act to eliminate police misconduct. *Id.*, at 376. This Court stated that a persistent pattern of police misconduct alone was insufficient. A showing that it was based on *deliberate policy of the supervisory officials (Id.,* at 374)[58] or flowed form an *intentional* effort to invade constitutional rights (*Id.,* at 375),[59] was also required. Thus, in the context of injunctive relief, more than a deprivation of rights must be shown, *deliberate* participation by the public officials sought to be enjoined is required. A failure to act, presumably through negligence, is insufficient to justify relief. *Id.*, at 376.

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[57] *See also, O'Connor v. Donaldson, supra,* 422 U.S. 563, 577.

[58] As was true in *Hague v. C.I.O.,* 307 U.S. 496 (1939).

[59] As was true in *Allee v. Medrano,* 416 U.S. 802, 812, 814-815 (1974).

Only two months after *Rizzo, Paul v. Davis, supra,* 424 U.S. 693, was filed. In strongly worded *dicta,* the Court rejected the notion that § 1983 made actionable all common-law torts engaged in by state officials. Specifically, it stated that the fourteenth amendment was not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." (424 U.S. at 701.) See also, *Griffin v. Breckenridge,* 403 U.S. 88, 100-102 (1971). Concern was indicated lest "the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle" be thought to have claims under § 1983. *Id.* at 698. The majority rather clearly indicated that negligent torts were singularly inappropriate for application of § 1983. *Id.,* at 698-699. Moreover, the dissent did not contest the majority's evident disapproval of negligence as a basis of § 1983 liability.[60]/

Then, the Court announced its decision in *Estelle v. Gamble, supra,* 429 U.S. 97, holding that allegations of negligence in medical treatment by prison officials at most state a cause of action for malpractice cognizable in state courts. A cause of action under § 1983 is available only where prison personnel intentionally deny or delay a prisoner access to medical care or intentionally interfere with the treatment once prescribed, so as to evidence a "deliberate indifference" to a prisoner's serious illness or injury. (429 U.S. at 104-105.)

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[60]/ *See,* footnote 56, *ante.*

In *Estelle,* this Court recognized that though prison officials had a duty to provide medical care to prisoners and injury resulted, the nature and quality of the conduct and not simply its consequences had to be evaluated to determine whether there was a § 1983 claim. Thus, the Court of Appeals erred when it held that § 1983 "places no narrow limitation on the nature and quality of the conduct which it makes actionable but concerns itself entirely with the consequences of that conduct." Even though the harmful consequences may be identical, under *Estelle* only when they result from deliberate indifference, and not simply from negligence, is there a § 1983 cause of action.

In *Procunier v. Navarette, supra,* 434 U.S. 555, the Court had granted certiorari to determine whether prison officials could be liable under § 1983 for negligent interference with a prisoner's constitutional mail privileges. *Id.,* at 559-560. Because the Court disposed of the case on immunity grounds, the negligence issue was not resolved by the Court. *Id.,* at 566. However, Mr. Chief Justice Burger in his dissent stated:

> "Neither the language nor the legislative history of § 1983 indicates that Congress intended to provide remedies for negligent acts.
>
> "I would hold that one who does not intend to cause and does not exhibit deliberate indifference to the risk of causing the harm that gives rise to a constitutional claim is not liable for damages under § 1983."

The majority of federal circuits have held that mere negligence does not state a claim under § 1983. See *Bonner v. Coughlan,* 545 F.2d 565, 568, fn. 8 (CA7 1976), and cases cited therein. The cases of this Court and the circuits give implicit

recognition to the primary deterrent rationale of the statute. A § 1983 remedy might well deter deliberate conduct or omission, but is not likely to have much impact on inadvertent negligence. Permitting trials to go forward seeking money damages for negligent conduct against parole officials will not achieve rehabilitation or insure against recidivistic crime. It will have the reverse effect: capable personnel will leave or be discouraged from entering parole service.

Moreover, the burden of Civil Rights litigation on the federal courts is well documented and cannot be ignored.[61]/ The fears expressed by many congressman in 1871 that the act would work an imbalance in our system of federalism is slowly being realized whenever lower federal courts open their doors to new theories of liability not contemplated by the originators of the legislation. To hold that negligence in any form states a federal claim will subject to the burden of a jury trial and possible liability in damages, thousands of state and local public officials.

In sum, both the historical origins of § 1983 and the decisions of the Court teach that intentional conduct or a wilfull failure to act evincing deliberate indifference to settled rights -- and not negligence -- states a cause of action under the statute. Here, appellants' complaint, when stripped of improper conclusionary pleading, is reduced to a claim of poor "professional judgment" which does not give rise to a § 1983 action. *See Estelle v. Gamble, supra,* 429 U.S at 104-105 and fn. 10.

61/ *See,* McCormack, *Federalism and Section 1983,* 60 Va. L.R. 1 (1974).

IV.

CALIFORNIA GOVERNMENT CODE SECTION 845.8(a) GRANTING IMMUNITY TO A PAROLE OFFICIAL FOR A DETERMINATION TO RELEASE A PRISONER DOES NOT VIOLATE THE TWIN CONSTITUTIONAL CONCEPTS OF DUE PROCESS AND EQUAL PROTECTION

Appellants also argue that the concepts inherent in the due process and equal protection clauses of the Fourteenth Amendment render unconstitutional California Government Code section 845.8(a) which grants to a parole official immunity for a determination to release a prisoner. Appellants contend the immunity statute deprived Mary Ellen Martinez of the fundamental constitutional right to life. *See* Brief of Appellants, at 26-31. However, neither Government Code section 845.8(a) nor the California Court of Appeal opinion below infringes any "fundamental right" or creates any "suspect classification" that would require strict scrutiny under due process and equal protection standards. Therefore, the statute in issue must be upheld if it is rationally related to a legitimate governmental interest. As demonstrated below, the legitimate state interest in extending immunity to parole officials for their determinations to release prisoners on parole more than satisfies this constitutional standard.

A. Neither Government Code Section 845.8(a) Nor The Decision Below Infringes Any "Fundamental Right" Or Creates A "Suspect Classification"

This Court has held repeatedly that where government employs suspect classifications, such as race, or impinges upon

"fundamental rights," the Court will employ strict scrutiny and invalidate state action unless justified by a compelling state interest. *See e.g., Loving v. Virginia,* 388 U.S. 1 (1967) (racial classification); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (fundamental right of interstate travel); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966) (invalidation of the Virginia poll tax). Any other governmental action complies with equal protection and due process, however, as long as the classifications employed are "rationally related to a legitimate state interest." *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). As Mr. Justice Douglas articulated in *Williamson v. Lee Optical Co.,* 348 U.S. 483, 488 (1955):

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. [Citations omitted.] We emphasize again what Chief Justice Waite said in *Munn v. Illinois,* 94 U.S. 113, 134, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'"

In this case, appellants urge a "fundamental right" has been violated. The obvious flaw in appellants' somewhat unfathomable "fundamental right" argument is the simple fact that neither California Government Code section 845.8(a) nor the decision below abridges or affects the right to life or any other constitutionally recognized fundamental right.

California Government Code section 845.8(a) is part and parcel of the California Tort Claims Act (California

Government Code sections 810, et seq.) enacted by the California Legislature in 1963 in response to the California Supreme Court's abolition of the doctrine of governmental immunity in California in the case of *Muskopf v. Corning Hospital Dist.,* 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 (1961). Following the *Muskopf* decision the California Legislature elected to abolish common-law governmental tort liability by adoption of a comprehensive statutory scheme implementing the general principle that governmental liability in California would be coextensive with tort liability for private individuals, with certain exceptions embodied in immunity statutes, one of which is California Government Code section 845.8(a). The California courts have upheld the constitutionality of the California Tort Claims Act. *County of Los Angeles v. Superior Court,* 62 Cal.2d 839, 44 Cal.Rptr. 796, 402 P.2d 868 (1965); *Datil v. City of Los Angeles,* 263 Cal.App.2d 655, 660, 69 Cal.Rptr. 788 (1968). A state's regulation of the nature and scope of, and procedure for, governmental tort liability, rather than involving a fundamental right to life, is more akin to state regulation of business or industry referred to by the Court in *Williamson v. Lee Optical Co., supra,* 348 U.S. 483. The decision below, rather than violating any fundamental constitutional right, merely holds that the immunity doctrine prevents application of one particular common-law remedy -- a civil suit for money damages -- with regard to claims of improper release of parolees leveled against parole officials. As has been established by this Court a "person has no property, no vested interest, in any rule of common law," (*Munn v. Illinois,* 94 U.S. 113, 134 (1876); *accord Mondou v. New York, New Haven & Hartford Railroad Co.,* 223 U.S. 1, 50 (1912)), and limitations on common-law rights and causes of action "are relatively commonplace and have consistently been enforced by

the courts." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88, fn. 32 (1978).

This case involves no "suspect classification" that would call for strict scrutiny standards. Application of the immunity doctrine to parole officials, rather than creating a classification based upon any characteristics applies to every member of the general public. Thus, as long as legislative judgments are "rational and not invidious," the Court has not seen fit to invalidate a state statute on constitutional grounds.

B. The Doctrine Of Immunity For Parole Officials Promotes Legitimate And Important Governmental Interests

Since the doctrine of immunity for parole officials in connection with their determinations to release inmates on parole does not infringe upon any fundamental right or involve any suspect classification, the due process and equal protection provisions of the Fourteenth Amendment are not violated so long as the statute is "rationally based" and "rationally related to the achievement" of "legitimate" governmental interests or objectives. *Weinberger v. Salfi*, 422 U.S. 749, 769, 770 (1975); *accord e.g., Mathews v. De Castro*, 429 U.S. 181, 185 (1976). As demonstrated in section IIB, *supra*, immunity for parole officials in connection with their determinations to release inmates on parole promotes legitimate and important governmental interests.

The policies served by the immunity doctrine for parole officials are the same as the interests which underlie immunity for prosecutors and judges, *i.e.*, ensuring that parole officials'

energies are not deflected from their duties to the administration of the rehabilitation process, and helping to guarantee that these parole officials will be able to exercise their independence of judgment required by the governmental function unfettered by any fear of tort liability. *See Imbler v. Pachtman, supra*, 424 U.S. at 423.

It was precisely these interests the California Legislature had in mind when it enacted California Government Code section 845.8(a). Indeed, the Approved Law Revision Commission Comment to section 845.8(a) underscores the State's awareness of these interests:

> "This section is a specific application of the discretionary immunity recognized in California cases and in Section 820.2. The extent of the freedom that must be accorded to prisoners for rehabilitative purposes and the nature of the precautions necessary to prevent escape of prisoners are matters that should be determined by the proper public officials unfettered by any fear that their decisions may result in liability."

California courts have always construed such law revision comments as important guides in interpreting and applying the California Tort Claims Act. *See e.g., Van Arsdale v. Hollinger*, 68 Cal.2d 245, 66 Cal.Rptr. 20, 437 P.2d 508 (1968). Appellees respectfully submit that the legitimate and rational governmental purposes enunciated in the approved Law Revision Commission Comment to section 845.8 are sufficient to render that section constitutional as against any challenge appellants have presented. Appellants respectfully submit that California Government Code section 845.8(a) and the opinion of the California Court of Appeal below are not only rational,

but also essential in order to enable parole officials to fulfill their obligations to the rehabilitative process of our penological system and, thus, to society.

CONCLUSION

For the foregoing reasons, appellees urge this Court to affirm the decison below, upholding the absolute immunity for officials in § 1983 actions in connection with their determinations to release inmates and, upholding the constitutionality of California Government Code section 845.8(a).

Respectfully submitted,

GEORGE DEUKMEJIAN,
Attorney General
ROBERT L. BERGMAN,
Assistant Attorney General
JEFFREY T. MILLER,
Deputy Attorney General

By: JEFFREY T. MILLER
Deputy Attorney General

Attorneys for Appellees

APPENDIX

ADULT AUTHORITY POLICY STATEMENT

"VISITORS AND/OR OBSERVERS ATTENDING ADULT AUTHORITY HEARINGS"

The Adult Authority, while not permitting persons to appear in opposition to or advocates for any particular inmate, has since its inception followed the policy of inviting as its official guests, legislators, judges, members of grand juries, law enforcement officials, prospective employers of parolees, union officials, representatives of the press, educators and other interested persons to attend its hearings. Wardens and Superintendents have also invited guests of the institution to attend Adult Authority hearings. Members of the institution and Departmental Staff attend Adult Authority hearings for the purpose of in-service training.

The following policies have been adopted by the Adult Authority pertaining to the visiting program:

1. **Responsibility of the Classification and Parole Representative**

   The Classification and Parole Representative at each institution is responsible for making final arrangements for, and scheduling visitors at Adult Authority hearings in conformance with existing procedures.

   He will also be responsible for preparing a schedule of visitors and observers to attend the various panel hearings; this schedule will include both the name and official position or other reference data pertaining to the visitor.

   All visitors and observers, excepting those staff members attending for the purpose of in-service training, should sign the official guest book. All visitors and observers should be given a copy of the pamphlet "A Visitors Guide For Attendance at a Hearing of the California Adult Authority" and be

personally introduced to the panel members. When possible all official guests should be introduced to all Adult Authority Members present at an institution.

2. **Conduct of Visitors**

The decorum of visitors, observers, staff, and others should be essentially the same as in a court of law.

They must be informed of the confidentiality of the case data and material covered in the interview. Visitors are requested to refrain from moving about, whispering, taking notes or talking to the inmate during the interview. The panel members will be pleased to answer questions after the inmate has left the room.

Visitors should enter the hearing room when official business has recessed at the midmorning period. In no case should any person enter or leave the room during an interview.

3. **Assignment of Visitors (Observers) to Panels**

A. Without *prior* approval of panel members, no more than three visitors may observe any panel hearing. Visitors should be seated outside the visual range of the inmate and never behind a panel member.

B. Women visitors are welcome; however, they should be informed in advance that the panel may request they not observe a particular case if the issues are sensitive and their presence would be likely to affect the hearing.

C. Visitors, including staff, should be screened carefully so that no one will visit a panel where a case may be of personal interest to him. This is especially true in the case of newspaper reporters who may be interested in an individual case. If the Adult Authority desires a certain visitor to hear a particular case, such desire will be made known to the Staff Representative.

4. **Scheduling of Visitors**

Care should be taken not to schedule visitors on the last day of the hearings as the panels may complete hearings ahead of schedule, or other commitments may interfere with devoting necessary time to visitors.

5. **Correctional Personnel as Visitors**

When correctional personnel are in attendance as visitors or for in-service training purposes, equipment and apparel such as rain gear, lunch pails, etc., should not be brought into the hearing room. Correctional officers, when attending as visitors, should remove their caps.

6. **Inmate Notification**

Provisions should be made to have the officer in charge of the line or some other responsible official determine in advance from the inmate whether or not he would object to the presence of visitors at his hearing, since some are sensitive to such intrusion. In fairness to the inmates who do object, their hearings should be deferred to a part of the calendar which will not be witnessed by visitors. This is particularly important when women visitors are involved and applies to both official visitors and uniformed or female institutional personnel attending for in-service training purposes.

7. **Visitors and Observers Attending P&CS Calendars and Special Meetings**

As these types of calendars primarily involve a review of case material as opposed to a hearing with the inmate or parolee present, and that only sufficient copies of the case material required by the official participants are available, it is not the policy of the Adult Authority to promote a visiting program for such Calendars. From time to time, staff members and official observers approved by the Chairman may attend for purposes of orientation or in-service training; under such conditions, advanced planning will be required to ascertain that the observer will have access to the case material required to follow the hearing.

CALIFORNIA GOVERNMENT CODE

§ 13959. Declaration of public interest

It is in the public interest to indemnify and assist in the rehabilitation of those residents of the State of California who as the direct result of a crime suffer a pecuniary loss.

(Added by Stats. 1973, c. 1144, p. 2348, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 1122, p. ____, § 1.)

§ 13960. Definitions

As used in this article:

(a) "Victim" shall mean:

(1) A person who sustains physical injury or death as a direct result of a crime of violence;

(2) Anyone legally dependent for his support upon a person who sustains physical injury or death as a direct result of a crime of violence; and

(3) In the event of a death caused by a crime of violence, any individual who legally assumes the obligation, or who voluntarily pays the medical or burial expenses incurred as a direct result thereof.

(b) "Crime of violence" shall mean a crime or public offense as defined in Section 15 of the Penal Code which results in physical injury to a resident of this state, including such a crime or public offense, wherever it may take place, when such resident is temporarily absent from the state. No act involving the operation of a motor vehicle, aircraft, or water vehicle which results in injury or death shall constitute a crime of violence for the purposes of this article, except that a crime of violence shall include:

(1) Injury or death intentionally inflicted through the use of a motor vehicle, aircraft, or water vehicle; or,

(2) Injury or death sustained in an accident caused by a driver in violation of Section 20001, 23101, 23102, 23105, or 23106 of the Vehicle Code.

(3) Injury or death sustained in an accident caused by a driver of a motor vehicle in the immediate act of fleeing the scene of a crime of violence in which he knowingly and willingly participated.

(c) "Board" shall mean the State Board of Control.

(d) "Pecuniary loss" shall mean the amount of medical or medical related expense and loss of income or support that the victim has incurred or will incur as a direct result of an injury or death to the extent that the victim has not been or will not be indemnified from any other source. Said loss shall be in an amount of more than one hundred dollars ($100) or shall be equal to 20 percent or more of the victim's net monthly income, whichever is less.

(Added by Stats. 1973, c. 1144, p. 2348, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 521, p. ____, § 1.)

§ 13961. Application for assistance

(a) A victim of a crime of violence may file an application for assistance with the board provided that the victim was a resident of California at the time the crime was committed and either:

(1) The crime was committed in California; or

(2) The person whose injury or death gave rise to the application was a resident of California who was injured or killed while temporarily outside the state.

(b) The board shall supply and make available application forms for this purpose.

(c) The period prescribed for the filing of an application for assistance shall be one year after the date of the crime, unless an extension is granted by the board, except that such period may be extended by the State Board of Control for good cause shown by the victim.

(d) The application for assistance shall be verified and shall contain the following:

(1) A description of the date, nature, and circumstances of the crime or public offense.

(2) A complete financial statement including but not limited to the cost of medical care or burial expense and the loss of wages or support the victim has incurred or will incur and the extent to which the victim has been or may be indemnified for these expenses from any source.

(3) When appropriate, a statement indicating the extent of any disability resulting from the injury incurred.

(4) An authorization permitting the State Board of Control to verify the contents of the application.

(5) Such other information as the board may require.

(Added by Stats. 1973, c. 1144, p. 2349, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 636, p. ____, § 1.)

§ 13961.5 Examination of sexual assault victims; costs

No costs incurred by a hospital or other emergency medical facility for the examination of the victim of a sexual assault, when such examination is performed for the purposes of gathering evidence for possible prosecution, shall be charged directly or indirectly to the victim of such assault. Such costs shall be treated as local costs and charged to the appropriate local governmental agency as follows:

(a) If the treatment or services are provided at a county or city hospital, or hospital district facility, the county shall pay the expenses.

(b) If the treatment or services are performed at a private hospital, the expenses shall be paid by the local governmental agency in whose jurisdiction the alleged offense was committed.

(Added by Stats. 1974, c. 1091, p. 2319, § 1.)

§ 13962. Review, verification, and consideration of application

(a) The staff of the board shall appoint a clerk to review all applications for assistance in order to insure that they are complete. If the application is not complete, it shall be returned to the victim with a brief statement of the additional information required. The victim, within 30 days of receipt thereof, may either supply the additional information or appeal such action to the board which shall review the application to determine whether or not it is complete.

(b) If the application is accepted, it shall be promptly verified by the staff of the State Board of Control. The board thereupon shall consider the application at a hearing at a time and place of its choosing. The board shall notify all interested persons not less than five days prior to the date of the hearing.

(c) The victim shall cooperate with the staff of the State Board of Control in the verification of the information contained in the application. Failure so to cooperate shall be reported to the board, which, in its discretion, may reject the application on this ground alone.

(Added by Stats. 1973, c. 1144, p. 2349, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 521, p. ____, § 2; Stats. 1977, c. 636, p. ____, § 2.)

§ 13963. Hearing

(a) At the hearing, the board shall:

(1) Review the application for assistance and the report prepared thereon and any other evidence obtained as a result of the investigation.

(2) Receive such other evidence as the board finds necessary or desirable properly to evaluate the application.

(b) If the victim chooses not to appear at the hearing, the board may act solely upon the application for assistance, the staff's report, and such other evidence as appears in the record.

(Added by Stats. 1973, c. 1144, p. 2350, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 636, p. ____, § 3.)

§ 13964. Approval of application; ineligibility for assistance

After having heard the evidence relevant to the application for assistance, the board shall approve the application if a preponderance of the evidence shows that as a direct result of the crime the victim incurred an injury which resulted in a pecuniary loss. However, no victim shall be eligible for assistance under the provisions of this article if:

(a) The board finds that the victim or the person whose injury or death gave rise to the application knowingly and willingly participated in the commission of the crime;

(b) The victim or the person whose injury or death gave rise to the application failed to cooperate with a law enforcement agency in the apprehension and conviction of the criminal committing the crime;

(c) The board finds that the victim should not be allowed to recover because of the nature of his involvement in the events leading to the crime or the involvement of the persons whose injury or death gave rise to the application.

(Added by Stats. 1973, c. 1144, p. 2350, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 521, p. ____, § 3; Stats. 1977, c. 1122, p. ____, § 2.)

§ 13965. Types of assistance

(a) If the application for assistance is approved, the board shall determine what type of state assistance will best aid the victim. The board may take any or all of the following actions:

(1) Authorize a cash payment to or on behalf of the victim equal to the pecuniary loss attributable to medical or medical related expenses directly resulting from the injury but not to exceed ten thousand dollars ($10,000);

(2) Authorize a cash payment to the victim equal to the pecuniary loss resulting from loss of wages or support directly resulting from the injury, but not to exceed ten thousand dollars ($10,000);

(3) Authorize cash payments not to exceed three thousand dollars ($3,000) to or on behalf of the victim for job retraining or similar employment-oriented rehabilitative services.

(b) Assistance granted pursuant to this article shall not disqualify an otherwise eligible victim from participation in any other public assistance program.

Cash payments made pursuant to this article may be on a one time or periodic basis. If periodic, the board may increase, reduce, or terminate the amount of assistance according to need, subject to the maximum limits provided in paragraphs (1), (2), and (3) of subdivision (a).

(c) The board may also authorize payment of attorney's fees representing the reasonable value of legal services rendered to the applicant, but not to exceed 10 percent of the amount of the award, or five hundred dollars ($500), whichever is less.

No attorney shall charge, demand, receive, or collect any amount for services rendered in connection with any proceedings under this article except as awarded under this section.

(Added by Stats. 1973, c. 1144, p. 2350, § 2, operative July 1, 1974.)

§ 13966. Subrogation; lien; disposition of proceeds

(a) The State of California shall be subrogated to the rights of the victim to whom cash payments are granted to the extent of the cash payments granted, less the amount of any fine imposed by the court on the perpetrator of the crime. Such subrogation rights shall be against the perpetrator of the crime or any person liable for the pecuniary loss.

(b) The state also shall be entitled to a lien on the judgment in the manner provided in Section 688.1 of the Code of Civil Procedure in the amount of such cash payments on any recovery made by or on behalf of the victim. The state may recover this amount in an separate action, or may intervene in an action brought by or on behalf of the victim. The state shall pay 25 percent of the amount of any recovery which is subject to a lien on the judgment in the manner provided in Section 688.1 of the Code of Civil Procedure to the county probation department or the victim responsible for recovery thereof from the perpetrator of the crime. The remaining 75 percent of the amount shall be deposited in the Indemnity Fund.

(c) In the event that the victim, his guardian, personal representative, estate, or survivors, or any of them, bring an action for damages against the person or persons liable for the injury or death giving rise to an award by the board under this article, notice of institution of legal proceedings, notice of settlement and all other notices required to be given to the judgment debtor pursuant to Chapters 1 (commencing with Section 681) and 2 (commencing with Section 714) of Title 9 of Part 2 of the Code of Civil Procedure, shall be given to the board in Sacramento except in cases where the board specifies that notice shall be given to the Attorrney General. All such notices shall be given by the attorney employed to bring this action for damages or by the victim, his guardian, personal representative, estate, or survivors, if no attorney is employed.

(Added by Stats. 1973, c. 1144, p. 2351, § 2, operative July 1, 1974. Amended by Stats. 1976, c. 661, p. 1631, § a; Stats. 1977, c. 521, p. ——, § 4.)

§ 13969. Payment of claims

Claims under this article shall be paid from a separate appropriation made to the State Board of Control in the Budget Act and as such claims are approved by the board.

(Added by Stats. 1973, c. 1144, p. 2352, § 2, operative July 1, 1974.)

§ 13969.1 Decisions; reconsiderations; judicial review

(a) The decisions of the board shall be in writing. Copies of the decisions shall be delivered to the applicant or to his representative personally or sent to them by mail.

(b) The board itself may order a reconsideration of all or part of the application for assistance on its own motion or on written request of the applicant or his representative. The board may not grant more than one such request on any application for assistance. The board shall not consider any such request filed with the board more than 30 days after the personal delivery or mailing of the original decision.

(c) Judicial review of a final decision made pursuant to this article may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure. The right to petition shall not be affected by the failure to seek reconsideration before the board. Such petition shall be filed as follows:

(1) Where no request for reconsideration is made, within 30 days of personal delivery or mailing of the board's decision on the application for assistance.

(2) Where a timely request for reconsideration is filed and rejected by the board, within 30 days of personal delivery or mailing of the notice of rejection.

(3) Where a timely request for reconsideration is filed and granted by the board, or reconsideration is ordered by the board, within 30 days of personal delivery or mailing of the final decision on the reconsidered application.

(Added by Stats. 1977, c. 521, p. ____, § 5.)

§ 13969.1 Decisions of board; notice; reconsideration; mandamus petitions; time

(a) The decisions of the board shall be in writing. Copies of the decisions shall be delivered to the applicant or to his representative personally or sent to them by mail. It is the intent of the Legislature in enacting this provision to assure reasonable notice of a decision of the board to an applicant, and it is not the intent of the Legislature to require the board to issue a formal opinion in any case.

(b) The board itself may order a reconsideration of all or part of the application for assistance on its own motion or on written request of the applicant or his representative. The board may not grant more

than one such request on any application for assistance. The board shall not consider any such request filed with the board more than 30 days after the personal delivery or 60 days after the mailing of the original decision.

(c) Judicial review of a final decision made pursuant to this article may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure. The right to petition shall not be affected by the failure to seek reconsideration before the board. Such petition shall be filed as follows:

(1) Where no request for reconsideration is made, within 30 days of personal delivery or within 60 days of the mailing of the board's decision on the application for assistance.

(2) Where a timely request for reconsideration is filed and rejected by the board, within 30 days of personal delivery or within 60 days of the mailing of the notice of rejection.

(3) Where a timely request for reconsideration is filed and granted by the board, or reconsideration is ordered by the board, within 30 days of personal delivery or within 60 days of the mailing of the final decision on the reconsidered application.

(Added by Stats. 1977, c. 1122, p. ____, § 4.)

For another section of the same number added by Stats. 1977, c. 521, p. ____, § 5, see § 13969.1, ante.

§ 13967. Fines and penalty assessments; imposition; disposition of proceeds

Upon a person being convicted of a crime of violence committed in the State of California resulting in the injury or death of another person, if the court finds that the defendant has the present ability to pay a fine and finds that the economic impact of the fine upon the defendant's dependents will not cause such dependents to be dependent on public welfare the court shall, in addition to any other penalty, order the defendant to pay a fine commensurate with the offense committed, and with the probable economic impact upon the victim, of at least ten dollars ($10) but not to exceed ten thousand dollars ($10,000). In addition to any other penalty, upon a person being convicted of any other felony or misdeameanor there shall be levied a penalty assessment of ten dollars ($10) for each felony conviction and five dollars ($5) for each misdemeanor conviction upon every fine, penalty, and forfeiture imposed and collected by the courts.

Any fine or penalty assessment imposed pursuant to this section shall not be subject to any penalty assessment imposed pursuant to Section 13521 of the Penal Code. The fine or penalty assessment imposed pursuant to this section shall be deposited in the Indemnity Fund in the State Treasury, hereby continued in existence, and the proceeds of which shall be available for appropriation by the Legislature to indemnify persons filing claims pursuant to this article.

(Added by Stats. 1973, c. 1144, p. 2351, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 1122, p. ____, § 3.)

§ 13968. Rules and regulations; notice of provisions of chapter

(a) The State Board of Control is hereby authorized to make all needful rules and regulations consistent with the law for the pruposes of carrying into effect the provisions of this notice.

(b) It shall be the duty of every hospital licensed under the laws of this state to display prominently in its emergency room posters giving notification of the existence and general provisions of this chapter. The board shall set standards for the location of such display and shall provide posters, application forms and general information regarding the provisions of this chapter to each hospital and physician licensed to practice in the State of California.

(c) It shall be the duty of every local law enforcement agency to inform victims of violent crimes of the provisions of this chapter and to provide application forms to victims who desire to seek assistance pursuant to this article. The board shall provide application forms and all other documents which local law enforcement agencies may require to comply with this action. The board shall set standards to be followed by local law enforcement agencies for this purpose and may require them to file with the board a description of the procedures adopted by each agency to comply.

(Added by Stats. 1973, c. 1144, p. 2351, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 636, p. ____, § 4.)

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1268

GEORGE MARTINEZ, et. al.,
Appellants,

v.

STATE OF CALIFORNIA, et. al.,
Respondents.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE.

BRIEF, AMICUS CURIAE, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF APPELLANTS

FRANK CARRINGTON, ESQ.
Victims' Rights Center
Americans for Effective Law Enforcement, Inc.
East Coast Office
4530 Oceanfront
Virginia Beach, Va. 23451
(804) 422-2692

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1268

GEORGE MARTINEZ, et.al.,
Appellants,

v.

STATE OF CALIFORNIA, et. al.,
Respondents.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE.

BRIEF AMICUS CURIAE, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF THE APPELLANTS.

This brief is filed pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Counsel for Appellants and Counsel for Respondents have consented in writing to our filing; and letters to this effect have been lodged with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

Americans for Effective Law Enforcement, Inc., (AELE) is a national, not-for-profit organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.

2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of the law abiding citizens.

3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problem of crime and punishment.

The Victims Rights Center is an integral part of AELE. The Center explores the question of the legal rights of the victims of crime. This case, which we consider to be a case of first instance before this Court, squarely presents the question of whether victims (or their survivors) may seek redress under the Constitution and statutes of the United States against state correctional officials whose gross negligence in the release of a prisoner proximately causes the death of, or injury to, the victim. We can

think of no more important issue, insofar as victims' rights are concerned, to come before this Court.

ARGUMENT

I. IMPORTANT PUBLIC POLICY CONSIDERATIONS DICTATE THAT STATE OFFICIALS BE HELD ACCOUNTABLE IN CASES INVOLVING GROSS NEGLIGENCE IN THE RELEASE OF PRISONERS.

Amicus will not reiterate the legal arguments, made by Appellant Martinez, at any length; although we agree with them and wish to associate ourselves with them. We will, in this brief, discuss what we believe to be the important public policy considerations which underlie the issues in the instant case.

The question to be resolved: whether officials of the State of California should have absolute immunity from the consequences of their decision to release a patently dangerous offender into society, is relatively straightforward. The policy issues presented by this case, however, have the greatest possible ramifications for the rights of victims of crime, and, perhaps more importantly, they concern the prevention of future victimization by those who are released.

In recent years courts across the nation have been more and more confronted with this issue; and they have often reached conclusions that are

diametrically opposed.[1] Two cases are illustrative of this dichotomy.

In Whitcombe v. County of Yolo, 73 Cal. App. 3d 698, 141 Cal. Rptr. 189, (1977), a certain Daniel Gibson had been incarcerated for first-degree robbery and ordered to undergo psychiatric evaluation. The results of this examination were that:

> ...Gibson has a schizoid personality; a probable neurotic compulsion; that he tended to project and act out great anger towards people; that he exhibited hysterical reactions to stressful situations; and that he extracted compensation in a direct and inappropriate manner from those who he believed had harmed him (141 Cal. Rptr., at 191).

Psychiatric jargon aside, it was evident from this evaluation that Gibson was a dangerous man, likely to victimize again. Gibson was, nonetheless, released on probation and was placed under the supervision of Yolo County probation officers Myers and Cobb. Shortly thereafter, Gibson, while still on probation, proceeded to steal some bees from Mr. Whitcombe, who with an employee named Hernandez, assisted the police in the investigation of the theft which led to Gibson's arrest for the crime.

Gibson was released on bail and, six days later,

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[1] See, e.g. Semler v. Psychiatric Institute, 538 F. 2d 121 (4th Cir. 1976), cert. den 97 S. Ct. 83 (1976); Rieser v. District of Columbia, 580 F. 2d 647 (D.C. Cir., en banc, 1978). See generally Inbau and Carrington, "Victims Rights Litigation. A Wave of the Future?" 11 U. Rich. Law Rev. No. 3, Spring 1977, P. 447.

according to the California Appellate Court, assaulted and severely injured Mr. Whitcombe and Mr. Hernandez:

> Forcing Whitcombe to lie down [Gibson] crushed his skull with the butt end of a shotgun and repeatedly struck him with a hammer. Similarly, forcing Hernandez to the ground, he bound his hands and feet; and with a rope about his neck, strangled him into unconsciousness (141 Cal. Rptr. at 191).

Whitcombe and Hernandez sued the County of Yolo for the negligence of the probation officers in failing to investigate the activities of probationer Gibson and failing to protect them from Gibson's depredations. The California Appellate Court for the Third District found against Whitcombe and Hernandez. For purposes of this brief the most pointed statement that the Court (Reynoso, J.) made was that:

> ...of paramount concern is the detrimental effect a finding of liability would have on prisoner release and rehabilitation programs. Were we to find a cause of action stated we would in effect be encouraging the detention of prisoners in disregard of their rights and society's needs. (141 Cal. Rptr. at 199). (Emphasis supplied)

This judicial pronouncement comes as close as possible to articulating the basis for a total immunity for negligent correctional officials. The

philosophy embodied in this statement seems to be that the "rights" of convicted criminals to early release with little or no supervision (no matter how dangerous they may be) are the only consideration for courts and correctional officers; hence, their decisions must be unfettered and cloaked with absolute immunity, in the name of "rehabilitation."

We submit that any such philosophy ignores the rights of the potential victims of those who are released before they should be. The legal theory evidenced by the absolute immunity doctrine basically says that we must "take a chance" with the safety of society in order to vindicate the theory of rehabilitation. Causes such as the instant case, in our opinion, demonstrate that this may be too high a risk for society to hazard.

The opposite end of the spectrum to the Whitcombe philosophy is to be found in the case of Grimm v. Arizona Board of Pardons and Paroles, 564 P 2d. 1227 (1977) decided by the Supreme Court of the State of Arizona. Grimm is factually on a par with the Whitcombe case and almost on all fours with the instant case, yet a totally different conclusion was arrived at by the court in Grimm.

In Grimm, one Mitchell Thomas Blazak was confirmed in the Arizona Penitentiary in 1967 for armed robbery and assault with intent to kill. Blazak's psychiatric evaluation was, like that of Daniel Gibson in Whitcombe, ominous. He was:

> ...an extremely dangerous person who should not be free in society until some major psychological changes take place. He is a paranoid schizophrenic whose psychosis prevents him from distinguishing between right and wrong and from controlling his conduct. He has never made an adjustment to society for any prolonged period and is unlikely to change. He has a definite potential for violence. 564 P. 2d, at 1230.

As in Whitcombe, and in the instant case, the releasing authorities in Grimm apparently chose to ignore the evaluations of competent medical authorities who, presumably, were retained precisely for the purpose of making such evaluations. Blazak was released by the Arizona Board of Pardons and Paroles after serving one-third of his sentence. On December 15, 1973 he murdered Mr. John Grimm and seriously injured another in an armed robbery in Tucson.

Mr. Grimm's wife sued the Arizona Board of Pardons and Paroles, alleging that the "grossly negligent and reckless release"[2] of Blazak was the proximate cause of her husband's death.

In the Grimm case, the Arizona Supreme Court, unlike the California Appellate courts in Whitcombe and in the instant case, took what might be aptly called a "victim oriented" point of view.

Although Arizona had a statute in effect at the time that the Grimm case arose which authorized and set forth criteria for release of offenders on parole,[3] the Supreme Court of that state held that the

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[2]/ 564 P 2d, at 1230.

[3]/ Ariz. Rev. Stat. #31-412.

members of the Board of Pardons and Paroles could be sued, in their personal capacities, for negligence in the release of Blazak.[4]

The rationale of the Arizona Supreme Court was 180 degrees at variance with the rationale of the Court in Whitcombe. Whereas the Whitcombe court concerned itself solely with the "rights" of convicted criminals to early release, the Arizona court dealt with the question of the "accountability" of public officials who make decisions as to the release of convicted criminals. The court concluded that Mrs. Grimm had stated a cause of action in negligence, adding:

> We have come to this conclusion because of the increasing power of the bureaucracy - the administrators - in our society. The authority wielded by so-called faceless bureaucrats has often been criticized. Comparing the relatively small number of judges with the large numbers of administrators, the idea of fearless, unbridled decision-making becomes less appealing. While society may want, and need courageous, independent policy decisions among high level government officials, there seems to be no benefit and indeed, great potential harm in allowing unbridled discretion without fear of being held to account for their actions for every single public official who exercises discretion. The more power bureaucrats

[4]/ 564 P 2d at 1230.

> exercise over our lives the more we need some sort of ultimate responsibility to lie for their most outrageous conduct. There may even be some deterrent value in holding officers liable for shocking outrageous actions.
>
> In any case, democracy by its very definitions implies responsibility (citations omitted). In this day of increasing power wielded by government officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous.[5]

The Arizona Supreme Court was, however, careful to distinguish between the "second guessing" of any and all dispositions of correctional officials in their decisions to release and the imposition of liability for gross negligence. In this context it stated:

> We believe that a limited immunity for members of the Board of Pardons and Paroles with liability only for the grossly negligent or reckless release of a highly dangerous prisoner strikes the proper balance between the competing interests. The public has an interest in protection from premature release of highly dangerous prisoners as well as an interest in holding public officials responsible for outrageous conduct. The Board members have an interest in suit from reasonable decisions.[6]

[5]/ 564 P 2d at 1233.

[6]/ 564 P 2d at 1235.

Amicus will cite one final case as authority for the principle that the rights of society must be balanced against the purported rights of offenders to premature (and often grossly negligent) release. This case, one we believe to be of first instance, is Semler v. Psychiatric Institute, 538 F 2d. 121 (4th Cir., 1976). cert. den 97 S. Ct. 83 (1977).

Semler, we submit, lays down the proper guidelines for cases in which crime victims (or their survivors) file suit against negligent custodial officials. The Semler case is even closer to the factual situation of the instant case than Grimm or Whitcombe. Semler involved the murder of a 14-year-old girl who was abducted from the Maderia School in McLean, Virginia, tied to a tree, sexually molested and left to die of exposure by one John Gilreath on October 29, 1973.

Gilreath, a mentally disturbed individual (as was Richard June-Jordan Thomas in the instant case) had been convicted of abducting a young girl from the same Maderia School in October of 1971. He was sentenced to 20 years imprisonment; however, Gilreath's psychiatrist and his probation officer prevailed upon the sentencing judge to commit the defendant to the privately-owned Psychiatric Institute, in Washington, D.C., in lieu of incarceration in the penitentiary. Virginia Circuit Court Judge William Plummer agreed to this commitment but only on the condition that Gilreath not be permitted to leave secure confinement without a prior order of the court.

After a certain amount of temporary releases to out-patient status, based upon court approval, Gilreath's psychiatrist and his Virginia State

Probation Officer, took it upon themselves to release him to full-time out-patient status, without notice to, or the approval of, the sentencing court. Gilreath then proceeded to the Maderia School and abducted and murdered Natalia Semler.

The Semlers sued the Psychiatric Institute, Gilreath's psychiatrist, Dr. Wadeson, and the Virginia Probation Officer, Paul Folliard, for negligence in the release of Gilreath. The United States District Court for the Eastern District of Virginia,[7] sitting without a jury awarded the Semlers damages of $25,000 in wrongful death.[8]

The case was appealed to the United States Court of Appeals for the Fourth Circuit, which, in an unanimous panel opinion, affirmed the judgment for the Semlers. The analysis of the situation made by the Fourth Circuit is, we believe, instructive in a case of first instance before this Court such as the instant case.

The appellate court acknowledged that it could find no Virginia law precisely on the point at issue, so it turned to general principles of tort law.[9] Specifically, the Court reaffirmed the theory of the

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[7]/ This was a diversity of citizenship case because the Semlers lived in Virginia and the Psychiatric Institute, where Gilreath was committed, was located in Washington, D.C.

[8]/ We note, parenthetically, that the Semlers did not file the lawsuit for reasons of monetary gain. The entire amount of the award was placed in a trust fund, in Natalia Semler's name, to support scholarships for foreign affairs students. In the words of the Semlers' attorney, Robert Lewis, Esq.: "...they were very interested in seeing that this kind of thing didn't happen again." Monograph "Victims of Crime or Victims of Justice" American Bar Association, Criminal Justice Section, Committee on Victims, August 10, 1977, Chicago, Illinois.

[9]/ Citing: Trimeyer v. Norfolk Tallow Company, 192 Va. 776, at 780, 66 S.E. 2d 441, at 443, (1953).

Restatement of Torts (2d) #319 (1965):

> One who takes charge of a third party whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Applying this standard to the facts of the Semler case, the 4th Circuit found duty, breach and proximate cause of injury to Natalia Semler by John Gilreath, and it affirmed the judgment against the Psychiatric Institute, Dr. Wadeson and Probation Officer. Folliard.

Dr. Wadeson and the Psychiatric Institute were, of course, private parties so there was no question of sovereign immunity with regard to them. Defendant Folliard attempted to impose the defense of sovereign immunity under the contention that his acts were discretionary and therefore immune from civil liability. Under Virginia law, a state employee who exercises discretionary judgment is immune for liability for negligence.[10]

The Fourth Circuit rejected this defense, stating that because of the court's order not to release Gilreath without the approval of the sentencing court, Folliard's actions were ministerial and not protected by the doctrine of sovereign immunity.

We submit that the instant case comes squarely within the ambit of the rationale of Semler v. Psychiatric Institute. The Court in sentencing

[10] Lawhorne v. Harlan, 214 Va. 405, 200 S.E. 2d 569 (1973).

Richard June-Jordan Thomas recommended, if not actually ordering, that Thomas not be placed on probation and Thomas' record was such as to put any correctional official on notice that he was a very dangerous offender, and this was confirmed by the California psychiatric clinic at Atascadero.

Indeed, the Court of Appeals in Semler noted that: "Confinement of Criminals frequently is intended to protect the public, as well as punish and rehabilitate the wrongdoer."[11]

We believe that the legal principles enunciated in Semler and Grimm, supra, embody a reasonable and accurate description of what the law in this area ought to be. Certainly the Appellant in this case, Mr. Martinez asks no more of this Court. In seeking redress in this case, Plaintiff/Appellant requests this Court only to limit, under federal law,[12] the absolute immunity which the lower court held protected the defendants from any of the consequences of their conduct in the release of Richard June-Jordan Thomas.[13] Plaintiff/Appellant specifically requests this Court to limit the absolute immunity of government officials to a standard of "good faith."[14] We agree with the Courts in Grimm and Semler, supra, that such a ruling would balance the competing interests in cases such as this one.

This, of course, as not to state that there is no evidence of gross negligence in the instant case. Just

[11] 538 F 2d, at 124.

[12] 42 U.S.C. 1983.

[13] Govt. Code, California, #845.8.

[14] Martinez v. California, No. 1268, Jurisdictional Statement, at p. 15.

the opposite is true. This case is a classic example of why the absolute immunity of state correctional officials should be limited.

First, the killer of Mary Ellen Martinez had a record of sexual offenses, having attempted the forcible rape and torture of two young females in Tecolate Canyon in San Diego and having been convicted of that offense on December 12, 1969.

Second, he was determined to be a "mentally disturbed sexual offender" (MDSO) by the Atascadero State Mental Hospital and "not amenable to treatment."

Third, he had been sentenced to six months to 20 years for the original Tecolote Canyon attempted rapes, the sentencing court making the specific comment that he should not be paroled.

Fourth, he received no treatment while confined.

Fifth, Thomas himself had admitted to the authorities that he did not feel himself ready for parole and "...feared actions he might take if he in fact were paroled."[15]

It is difficult to imagine a factual situation of more egregious gross negligence, than in this particular case, when the California Adult Authority released Thomas after he had served five years. Even after his release he was not supervised on parole and, as might have been expected, Thomas returned to Tecolote Canyon and kidnapped and murdered Mary Ellen Martinez. If all of the elements of a cause of action sounding in tort: gross negligence, breach of a legal duty, proximate cause

[15]/ Information taken from the Jurisdictional Statement of Plaintiff/Appellant, pp. 5 & 6.

of injury, and extreme damage, do not lie in this case, there would be few similar cases in which they would lie. Semler v. Psychiatric Institute, supra.

It would appear that the sole barrier to recovery by the parents of Mary Ellen Martinez is California Government Code, Section 845.8(a), which purports to confer absolute immunity on correctional officials for the release of offenders. Plaintiff/Appellant seeks a ruling from this Court that this provision is unconstitutional. We submit that this point is well taken and urge this Court so to rule. Scheuer v. Rhoades, 416 U.S. 232 (1974), Wood v. Strickland, 420 U.S. 308, (1975)., Butz v. Economou, 438 U.S. 478 (1970).[16]

This Court has been vigilant to protect the rights of citizens who have been abused by the unlawful acts of government officials, particularly in the area of misconduct by state and federal police officers: Monroe v. Pape, 365 U.S. 167 (1961); Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Should the Court be less vigilant when the federally-protected right to life is violated through the gross negligence of state correctional officials? We submit that it should not.

Amicus would like to state emphatically that we are aware of the difficulties of the jobs performed by parole, probation and correctional officials in this country. Their jobs are as demanding as that of the policeman, "on-the-street" who is required to make instantaneous value judgments as to what he can or cannot do, usually under the exigent pressures of

[16]/ See also: Patricia J. v. Rio Linda Union School District, App. 132 Cal. Rptr. 211 (1976).

police work. Yet policemen are held accountable for their actions.

We do not suggest that correctional officials should be "second guessed" in every case that they make a disposition that goes awry. We do suggest that in cases such as this one, where gross negligence on the part of the releasing authority has been shown, some sort of accountability should be mandated by the Constitution and statutes of the United States.

No amount of monetary award in civil damages is going to bring Mary Ellen Martinez back to life; this is obvious. However, if correctional authorities in California and in other states are put on notice that they are accountable for gross negligence in the release of prisoners, then perhaps they will weigh in the balance the potential threat to society of their dispositions. If this should transpire future victims of the kind of crime illustrated by the tragic facts of the instant case and Semler, Whitcombe, and Grimm, may not be murdered, raped, assaulted, kidnapped, and so on.

We respectfully urge this Court to reverse the judgment of the California Court of Appeals.

CONCLUSION

For the reasons stated in our argument section we urge this Court to hold that the Constitution of the United States and particularly Title 42, Section 1983 limits blanket-immunity statutes such as Cal. Govt. Code 845.8 when gross negligence in the release of, and lack of supervision of, a dangerous prisoner is shown.

7

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Brief of Amicuscuriae upon counsel of record for the appellee, Honorable Jeffrey T. Miller, Deputy Attorney General, State of California, 110 West A - Suite 600, San Diego, California 92101, and Donald McGrath II, Suite 1405, 1200 3rd Avenue, San Diego, California 92101, pursuant to the requirements of Rule 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class postage prepaid, addressed to counsel of record for the appellee as set forth above, on or before July 5, 1979.

I further certify that I am a member of the bar of this Court, and that all parties required to be served have been served on or before July 5, 1979.

FRANK CARRINGTON

Counsel for Appellant

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS GEORGE MARTINEZ, ET AL.

RONALD A. ZUMBRUN
JOHN H. FINDLEY
Counsel, Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154
*Attorneys for Amicus Curiae
Pacific Legal Foundation*

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS GEORGE MARTINEZ, ET AL.

INTEREST OF AMICUS

Pursuant to Supreme Court Rule 42, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of appellant George Martinez. Consent to the filing of this brief has been granted by counsel for both the parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the

public interest. Policy for Pacific Legal Foundation is established by an independent Board of Trustees, composed of concerned citizens, the majority of whom are attorneys. Many of Pacific Legal Foundation's members, contributors, and supporters have expressed concern regarding injuries inflicted by unrehabilitated criminals while on parole, the lack of restraints on California parole authorities, and the denial of redress through damages resulting from the immunity statute here at issue. In order to give voice to these concerns, the Pacific Legal Foundation Board of Trustees has authorized the filing of this brief.

Pacific Legal Foundation strongly believes that absolute immunity for parole boards is contrary to public policy in that it discourages parole boards from considering the risk to public safety inherent in the premature release of unrehabilitated felons. Rather, a qualified immunity is sufficient to protect good faith action by parole boards while still allowing injured members of the public redress for parole board actions which shock the conscience.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is reported at 85 Cal. App. 3d 430 (1978).

STATEMENT OF THE CASE

This lawsuit was filed by George Martinez against the State of California seeking compensatory and punitive damages for the wrongful death of his fifteen year old daughter. Mary Ellen Martinez was kidnapped and murdered by Richard June-Jordan Thomas, a convicted

rapist who had been designated a Mentally Disordered Sex Offender, not amenable to treatment. Perhaps because of Thomas' history of torturing young girls in attempts to rape them, the committing judge had recommended that Thomas not be paroled. During his incarceration, Thomas had received no psychiatric treatment. Despite this alarming case history and despite the fact that Thomas had had no recent psychiatric evaluation, California parole officials released Thomas on parole fifteen years prior to the expiration of his sentence. Five months after his parole, Thomas killed Mary Ellen Martinez. The California courts dismissed Mr. Martinez's lawsuit, ruling that California Government Code §845.8 provides absolute immunity to the state and its employees for actions in connection with the release of prisoners on parole.

ARGUMENT

I

EQUAL PROTECTION OF THE LAWS PRECLUDES ABSOLUTE IMMUNITY FOR STATE PAROLE OFFICIALS

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 397 (1971), this Court, in examining the claimed absolute immunity of federal agents for their actions, put the issue precisely:

> "The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts."

The issue here is similar: whether appellant Martinez, if he can demonstrate an injury caused by the violation of his constitutional rights by California agents, is entitled to redress his injury through the remedy of damages which are normally awarded in state and federal courts in the absence of statutory immunity.

Mr. Martinez has brought suit for damages to redress the wrongs resulting in his daughter's death. His causes of action in this regard are reminiscent of those in *Scheuer v. Rhodes*, 416 U.S. 232, 235 (1974), in which the plaintiffs sued the Governor of Ohio and other state officers alleging that they intentionally, recklessly, willfully, and wantonly caused an unnecessary deployment of the Ohio National Guard on the Kent State campus resulting in the death of plaintiffs' decedents. The complaints there alleged that the action deprived the decedents of their lives and rights without due process of law:

> "Fairly read, the complaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office." *Id.*

Fairly read, the complaint here at issue makes the same allegation of acts, either outside the scope of office, or if within such scope, acts so arbitrary as to abuse grossly the lawful powers of office. As in *Scheuer*, so here, the primary question is whether the lower court:

> "acted prematurely and hence erroneously in dismissing the complaints on the stated grounds, thus precluding any opportunity for the plaintiffs by subsequent proof to establish a claim." *Id.* at 236.

As in *Scheuer*, so here, that primary question must be answered in the affirmative.

From the time our Republic was founded, this Court has recognized that:

> "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws . . . ." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

Only last term, this Court reaffirmed that, historically, damages have been regarded as the ordinary remedy for an invasion of the personal interest in liberty. *Butz v. Economou*, ... U.S. ....., 46 U.S.L.W. 4952, 4954 (1978).

The Fourteenth Amendment plainly protects the rights of individuals from deprivation by the state of life, liberty, or property:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Ironically, only the fact that the defendants are state officers prevents Martinez from obtaining the ordinary remedy for such invasion of civil liberties. California Government Code § 845.8[1] shields both the state and its employees from the consequences of their wrongful acts in prematurely releasing on parole an individual who such employees had reason to know was not rehabilitated and

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[1]Government Code § 845.8 provides in pertinent part:

> "Neither a public entity nor a public employee is liable for:
>
> "(a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release."

remained a danger to the public. The California Court of Appeal ruled that even if the defendant public employees had abused their discretion by granting parole—knowing the prisoner had tortured two girls in attempting to rape them, was an untreatable mentally disordered sex offender with a recommendation of no parole, had received no psychiatric treatment during his incarceration and had had no psychiatric evaluation as part of the parole determination—these factors could not overcome the immunity dictated by Section 845.8. *Martinez v. California,* 85 Cal. App. 3d 430, 434 (1978). The court therefore affirmed the dismissal of the action without leave to amend, *id.* at 438, leaving Martinez wronged but without a remedy.

Section 845.8 has been construed by the California courts to protect public employees in order to encourage the parole of prisoners to the exclusion of the rights and interests of members of the public. It is this failure to balance the interests of endangered members of the public with the interests of the prisoners seeking parole which constitutes a denial of due process and equal protection of the laws to persons in the position of Martinez.

The California courts have proven themselves almost cavalier in their disregard of the interests of the public in these matters. In *Whitcombe v. County of Yolo,* 73 Cal. App. 3d 698 (1977), a prisoner known to be violent was released; six days later the prisoner crushed the skull of one victim with a shotgun butt and strangled another victim into unconsciousness. In holding the releasing officials immune under Section 845.8 the court gave short shrift to redressing the victims' injuries:

> "Of paramount concern is the detrimental effect a finding of liability would have on prisoner release and rehabilitation programs. Were we to find a cause of action stated we would in effect be encouraging the detention of prisoners in disregard of their rights and society's needs." *Whitcombe,* 73 Cal. App. 3d at 716.

The court went on to say that while it recognized the grievousness of the victims' injuries, Section 845.8 is concerned with a greater social injury; the concerns of facilitating the reentry into society of "diverse individuals" outweighs the desirability of providing victims relief through the judicial process. *Id.* at 716-17.

The California Supreme Court reduced this philosophy to its essence in *Johnson v. State of California,* 69 Cal. 2d 782, 799 (1968):

> "[S]ection 845.8 requires that each member of the general public who chances to come into contact with a parolee bear the risk that the rehabilitative effort will fail . . . ."

Whitcombe and *Johnson* demonstrate that California recognizes that there are rights and risks involved in the parole process, but the state places all the rights with the parolee and all the risks with the members of the public. Amicus contends that the United States Constitution requires the opposite result.

This Court put the issue in perspective this term in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* ..... U.S. ....., 47 U.S.L.W. 4581 (1979). This Court there stated in the plainest terms:

> "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 4583.

In language pertinent to the present controversy, the Court quoted Judge Friendly's comment on the human difference between losing what one has and not getting what one wants. *Id.* at 4584. The Court made clear that protection against the loss of an existing interest outweighs the failure to obtain the object of one's hopes. So here, protection of members of the public against loss of life or other injury should outweigh the prisoner's hope for parole. The California courts' reversal of these principles denies the rights of due process and equal protection guaranteed by the Fourteenth Amendment.

This Court noted in *Butz* that the extension of absolute immunity from damages liability to executive officials would seriously erode the protection provided by basic constitutional guarantees:

> "In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." *Butz,* 46 U.S.L.W. at 4960.

In that case, this Court reaffirmed the principle that all individuals, whatever their position in government, are subject to the law:

> "'All officers of the government, from the highest to the least, are creatures of the law, and are bound to obey it.'" *Id.*

The Court, in light of this principle, found that government officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope. *Id.* The Court then observed that public policy considerations support a limited immunity for executive officials. While officials who are required to exercise their

discretion need to be protected in order to encourage the vigorous exercise of official authority, it is not unfair to hold liable the official who knows or should know that he is acting outside the law. Finding that insisting on an awareness of clearly defined constitutional limits will not unduly interfere with the exercise of official judgment, this Court held in *Butz* that in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to a qualified immunity. *Id.* Equal protection of the laws demand that state executive officials, including the defending parole officials, be held to that same standard of qualified immunity.

II

PAROLE OFFICIALS ARE ENTITLED TO ONLY A QUALIFIED IMMUNITY UNDER SECTION 1983

Appellant Martinez's complaint alleged violation of the Federal Civil Rights Act, 42 U.S.C. § 1983, saying the acts of the individual defendants under California Penal Code §§ 5075 and 5077[2] deprived plaintiff's decedent of her life and liberty. *Martinez,* 85 Cal. App. 3d at 436. The court below, however, ruled that such official acts are privileged if done within the scope of their official duties. The court further found that as members of the Adult Authority[3] the respondents are performing quasi-judicial functions when they make determinations regarding parole and are, therefore, immune from suit under the Civil Rights Act. *Id.*

---

[2]Section 5075 concerns the members, appointment term, vacancies, and qualifications of persons on the Community Release Board while Section 5077 deals with granting and revoking of parole by that Board. *Martinez v. California,* 85 Cal.App.3d 430, 436 n.3 (1978).

[3]Retitled Community Release Board by Cal. Stats. 1976, ch. 1139.

Title 42, United States Code, Section 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

This Court declared in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), that Section 1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. The respondent state officials, however, claim that because of their official positions they are absolutely immune from liability under Section 1983 and therefore not responsible for the natural consequences of their actions.

As was said in *Scheuer v. Rhodes*, 416 U.S. at 243, it can hardly be argued at this late date that under no circumstances can the officers of state government be subject to liability under Section 1983. In *Procunier v. Navarette*, 434 U.S. 555, 561 (1978), this Court stated that while recognizing that Congress in enacting Section 1983 must have intended to expose state officials to damages in some circumstances, the Court has consistently construed the section as not intending wholesale revocation of the common law immunity afforded government officials. While legislators, judges, and prosecutors have been held absolutely immune from damages liability under Section 1983, only a qualified immunity from damage is available to a

state governor, a president of a state university, National Guard members, school board members, the superintendent of a state mental hospital, and police officers. *Id.*

As noted in *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976), the procedural difference between an absolute and a qualified immunity is critical. An absolute immunity defeats a suit at the outset, so long as the officials' acts were within the scope of immunity. The fate of an official with qualified immunity, however, depends on the circumstances and motivations of his actions, as established by the evidence at trial. *Id.*

While amicus believes that the nature of their responsibilities entitle the parole officials here to a degree of immunity, neither legal precedent nor public policy supports their claim of absolute immunity. As noted above, only legislators, judges, and prosecutors enjoy absolute immunity under Section 1983. But these were immunities established at common law. The legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities and it is to be presumed that had Congress so intended, it would have specifically so provided. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).

There is, of course, no common law immunity for parole officials:

> "Indeed the very institution of parole is still in an experimental stage." *Greenholtz v. Inmates*, 47 U.S.L.W. at 4583.

The court below, however, found that parole determinations are a quasi-judicial function, thereby entitling respondents to absolute immunity. *Martinez*, 85 Cal. App. 3d at 436.

In *Butz v. Economou, supra,* this Court discussed the nature of judicial immunity in determining the degree of protection afforded administrative law judges. The Court pointed out that safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct:

> "The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges [footnote omitted]. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decision-making process, there is a less pressing need for individual suits to correct constitutional error." *Butz,* 46 U.S.L.W. at 4961.

None of these factors exist in the California parole system. Appointment is highly political with members of the Community Release Board not only appointed by the Governor but dependent upon him for reappointment. Cal. Penal Code § 5075. The Board is further politicized by the statutory mandate that its membership reflect the state's various racial, sexual, and economic groups. *Id.* Furthermore, the checks provided by the adversary system and carefully screened jurors are absent since these concepts are unknown to the parole system. Nor are witnesses subject to rigorous cross-examination under penalty of perjury since these features of the adversary system do not apply in the parole process.

Perhaps the most important factor justifying judicial immunity is that a judge's errors may be corrected on appeal. *Pierson v. Ray,* 386 U.S. at 554; *Butz,* 46 U.S.L.W. at 4961. While it may be true that the prisoner may seek judicial review of decisions adversely affecting him by habeas corpus, there is no recourse to the courts for the public when a parole board wrongfully releases an unrehabilitated felon into its midst. The public has no appeal. As this Court said regarding a member of the public who had no recourse other than Section 1983 for his injuries:

> "'For people in Bivens' shoes, it is damages or nothing.'" *Butz,* 46 U.S.L.W. at 4959, quoting *Bivens,* 403 U.S. at 410 (Harlan, J., concurring).

In the cases in which the Court has noted the quasi-judicial status of officials, only a qualified immunity was awarded, even though the safeguards noted in *Butz* and *Pierson* were present to a much greater degree than in the present case.

In *Wood v. Strickland,* 420 U.S. 308 (1975), the Court noted that:

> "[S]chool board members function at different times in the nature of legislators and adjudicators in the school disciplinary process." *Id.* at 319.

The Court further observed that:

> "School board members, among other duties, must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations." *Id.*

Although the decisions of school boards are subject to judicial review, *Cleveland Board of Education v. La Fleur,* 414 U.S. 632 (1974); *Goss v. Lopez,* 419 U.S. 565 (1975); *Hortonville Joint School District v. Hortonville Education Association,* 426 U.S. 482 (1976), the Court found that:

> "absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Wood v. Strickland,* 420 U.S. at 320.

In *O'Connor v. Donaldson,* 422 U.S. 563 (1975), an inmate of a state mental hospital brought a Section 1983 suit against the hospital staff. Like the respondents here, the hospital staff had the "quasi-judicial" power to release inmates. *Id.* at 567. Nonetheless, the Court refused to grant the hospital staff absolute immunity. Quoting from *Wood,* the Court reaffirmed the standard that the relevant question for the jury was whether the hospital superintendent:

> "'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [Donaldson], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [Donaldson].'" *Donaldson,* 422 U.S. at 577 (brackets in *Donaldson*).

Amicus believes that because of the above noted lack of safeguards for the public in the parole decision process, parole boards cannot be considered to come within even a

quasi-judicial definition, at least in relation to injured members of the public. Amicus notes, too, that parole boards are not faced with the burdens attendant upon other officials who are entitled to only qualified immunity. This Court noted in *Scheuer,* 416 U.S. at 246, that state governors like the police officers in *Pierson v. Ray,* 386 U.S. at 547, have a broad range of duties and authority and must often act swiftly and firmly at the risk that deferred action will be futile or constitute virtual abdication of office. It may also be noted that such officials are thrust into situations of major or minor civil disorders over which they have only tenuous control and in which they must sometimes make instantaneous decisions under great pressure. This contrasts strongly with parole officials, who have no other duties, who completely control the decision making process, who meet in the deliberate calm of climatically controlled offices, and whose decisions can be carefully reasoned through before implementation. In sum, parole board members face few of the pressures brought to bear on other officers of the executive branch.

Nonetheless, parole board members are often faced with difficult decisions and are entitled to some protection in their official capacity:

> "These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variations being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with

good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Scheuer v. Rhodes,* 416 U.S. at 247-48.

Under this qualified immunity a:

> "compensatory award will be appropriate only if the school [parole] board member has acted with such an impermissible motivation or with such disregard of the student's [public's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Wood v. Strickland,* 420 U.S. at 322.

Amicus believes that Section 1983 requires the invalidation of the state law granting absolute immunity to parole officials and the adoption of the *Scheuer* and *Wood* standards of qualified immunity for good faith actions.

CONCLUSION

As in *Scheuer,* 416 U.S. at 256, appellants' pleadings have specifically placed in issue whether the respondents were acting within the scope of their duties under the Constitution and state laws, whether they acted within the range of discretion permitted them under state law, and whether they acted in good faith as to the actions at issue. Here, as in *Scheuer,* further proceedings are required. The complaining party is entitled to be heard more fully than is permitted on a demurrer and the judgment below should therefore be reversed and remanded with instructions to accord the defending parole officials the qualified immunity available to other executive officers.

Dated July, 1979

Respectfully submitted,

RONALD A. ZUMBRUN
JOHN H. FINDLEY
Counsel, Pacific Legal Foundation
Attorneys for Amicus Curiae
Pacific Legal Foundation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1268

GEORGE MARTINEZ, *et al.*,

Appellants,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

On Appeal from the Court of Appeals of the State of California, Fourth Appellate District, Division One

AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for the State of New Jersey,
State House Annex,
Trenton, New Jersey 08625.

ERMINIE L. CONLEY,
Assistant Attorney General,
Of Counsel and
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

Interest of *Amicus*

The State parole board in New Jersey has the statutory responsibility for determining when and under what

conditions inmates in the State correctional institutions may be released where, based upon review of the inmate's records, the ". . . board is of the opinion that there is reasonable probability that, if such prisoner is released, he will assume his proper and rightful place in society, without violation of the law, and that his release is not incompatible with the welfare of society." N.J.S.A. 30:4-123.14. Pursuant to this standard, the parole board yearly considers approximately 3,000 to 4,000 parole release applications. The board grants parole in approximately 60% of these applications and denies parole in 40%.

Although members of the parole boards make every effort to reach an appropriate decision, there are bound to be situations where with the benefit of hindsight it could be said the decision was ill-advised. In fact, there is at least one similar suit currently pending in the courts of New Jersey. A reversal of the Court of Appeals decision in the case and a removal of the protection of absolute immunity would, therefore, subject parole board members to substantial potential liability to the general public arising from the occurrence of such unfortunate incidents. Moreover, there would be no justifiable basis for distinguishing between liability to the general public and liability to the inmate who might feel that his civil rights had been violated as a result of the parole adjudication. The adverse implications are significant. Parole members will be torn between fear of litigation by a parolee's potential victim and fear of litigation by dissatisfied inmates. These countervailing concerns will be bound to intrude substantially upon what is already an exceedingly difficult adjudication. A particular determination is likely to weigh more

heavily in favor of denial or grant of parole based solely upon the relative strength of the countervailing fears. Moreover, removal of the absolute immunity protection will make the State's task of finding qualified individuals to serve as members of parole boards a far more difficult task than it already is. Thus, it is clear that the State of New Jersey has a vital interest in insuring that the Court of Appeals decision is affirmed.

ARGUMENT

In adjudicating whether a particular inmate should be paroled, the members of the Parole Board are not liable under 42 U.S.C. §1983 for injuries caused by the parolee to members of the public.

A

The complaint does not state a §1983 cause of action because it does not allege a deprivation of a due process protection by the Parole Board owed to a potential victim of a parolee and because the injury was not caused by the Board.

Initially, although not decided by the Court of Appeals of California and therefore technically not an issue in this case, there must be significant doubt that the action by the parole board in granting parole is sufficient to support a 42 U.S.C. §1983 claim of constitutional deprivation. 42 U.S.C. §1983 imposes civil liability only upon one:

> ". . . who, under color of any statute, ordinance, regulation, custom, or usage of any State of Terri-

tory, subjects or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof *to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . .*" (emphasis added).

The bald assertion by appellants herein that the mere adjudication by the parole board granting parole in this case violated decedent's Fourteenth Amendment protection against deprivation of life without due process stretches 42 U.S.C. §1983 and the Fourteenth Amendment far beyond their intended scope.

There can be no §1983 cause of action in this case against the parole board because it was not the board's action which deprived the decedent of her life. As this Court stated in *Baker* v. *McCollan,* —— U.S. ——, 99 S.Ct. 2689 (1979), a public official is liable under §1983 only "if he *causes* the plaintiff to be subjected to deprivation of his constitutional rights. . . ." 99 S.Ct. at 2693. *Cf., Rizzo* v. *Goode,* 423 U.S. 362 (1976). See also *Jamison* v. *McCurrie,* 565 F.2d 483 (7th Cir. 1977). Moreover, the Fourteenth Amendment provides that "no *state* shall . . . deprive any person of life, liberty, or property. . . ." (emphasis added). No causal nexus exists in this case between the parole adjudication and the commission of the crime by the parolee and the deprivation of life was not the result of governmental action. In this respect, appellants' reliance upon *Wolfer* v. *Thaler,* 525 F2d 977 (5th Cir.), *cert.* den. 425 U.S. 975 (1976), *Mattis* v. *Schnorr,* 502 F.2d 588 (8th Cir. 1974), and *Brazier* v. *Cherry,* 293 F.2d 401 (5th Cir.), *cert.* den., *sub nom, Cherry* v. *Brazier,* 368 U.S. 921 (1961), is misplaced. In those cases the victims were allegedly shot

or beaten to death by state officers. In *Alvarez* v. *Wiley,* 71 Cal. App. 3d 599, 139 Cal. Rptr. 550 (1977) and *Spence* v. *Staras,* 507 F.2d 554 (7th Cir. 1974), the victims were injured while in the custody of state officials. In the present case, the victim was neither killed by state officials nor killed while in the custody of state officials. In fact there was no relationship whatsoever between the parole board members and the victim. She was simply the unfortunate victim of a tragic murder perpetrated by a lawfully released parolee. It would clearly be an unprecedented expansion of the Fourteenth Amendment due process protection if §1983 were construed to provide a cause of action to appellants.

Furthermore, the ramifications of appellants' theory are enormous. If a Fourteenth Amendment violation occurs where a private person commits a crime, the theory of appellants' cause of action extends far beyond the parole board in this case. For instance, it would mean that local police, who are never able to provide protection against all crimes, would be subject to suits by the aggrieved parties who have, as a result of the criminal conduct, been deprived of property or life. It is inconceivable that the Fourteenth Amendment and §1983 were intended to so expansively subject government to liability where the injury occurs at the hands of a private person. See *Reiff* v. *City of Philadelphia,* —— F.Supp. —— (D. Pa. 1979), 48 U.S.L.W. 2039 (June 25, 1979).

Furthermore, beyond the fact that there is no state action involved in this case, there is no due process protection afforded by the Fourteenth Amendment to appellants' decedent which the parole board violated. Although the specific boundaries of the protection afforded by the Fourteenth Amendment have not been defined, this Court's recent decision in *Baker* is instructive. In that case re-

spondent was mistakenly arrested by local police and detained in jail for eight days. Although recognizing that a denial of liberty had occurred, this Court held that since the arrest was accompanied by a warrant, the validity of which respondent did not challenge, respondent's detention had been accompained by all the process that was due him under the Constitution. In rejecting the Court of Appeals holding that the police were obligated by the Fourteenth Amendment to "exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant," this Court stated:

> "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. . . ." 99 S.Ct. 2695-2696.

Although the present case involves an alleged wrongful deprivation of life, as opposed to the deprivation of liberty in *Baker,* the absence of any violation of constitutional due process protection is, if anything, more evident. The closest appellants have come to articulating the process that was due decedent at the time the Parole Board adjudicated the matter is a reference in the third count of the complaint to a "duty to warn probable victims" of the release of the inmate (Ab6). The proposition that such a duty is a constitutional due process requirement is far more astounding than was the duty to insure proper identification procedures asserted in *Baker.* While the Constitution does require a parole board to afford inmates certain procedural protections, *Greenholtz* v. *Inmates of Nebraska Penal & Cor.,* —— U.S. ——, 99 S.Ct. 2100 (1979), it has never been extended to require separate procedural protections to potential "victims" of parolees. This Court has recently observed:

> "Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decision-making must comply with standards that assure error-free determinations . . . This is especially true with respect to the sensitive choices presented by the administrative decision to grant parole." *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex, supra,* 99 S.Ct. at 2104.

Application of the Fourteenth Amendment due process requirement to this case imposing an obligation upon a parole board to require, as appellants suggest, notice to a potential victim, would result in a constitutional duty that could never be fulfilled since the identity of a prospective parolee's potential victim, if any, could never be ascertained at the time of the parole adjudication. Consequently, under appellants' construction of §1983 and the Fourteenth Amendment, the parole authorities would be subject to potential liability everytime a parolee commits a crime. The result would be a constitutional protection afforded unknown potential victims of parolees which far exceeds that afforded those individuals whose liberty is directly under the parole boards' control. As this Court observed in *Baker,* the Fourteenth Amendment does not protect against all deprivations of liberty or life, but only against deprivations accomplished "without due process of law." 99 S.Ct. at 2695. As in *Baker,* there was no due process obligation owed to appellants or the decedent by the parole board, and therefore no deprivation thereof.

In sum, it is evident that a §1983 cause of action does not exist in this case. The parole adjudication of the board violated no constitutional due process protection of

the decedent victim. Moreover, it was not state action which caused the death of the decedent but rather the commission of a crime by the parolee.

B

The parole adjudication is a quasi-judicial function; members of a Parole Board are therefore clothed with absolute immunity against actions based upon an exercise of that function.

It has long been held that members of the judiciary are immune from civil actions, including suits under 42 U.S.C. §1983, for their judicial acts. The immunity is absolute and applies even where such acts a in excess of their jurisdiction or are alleged to be malicious or corrupt. *Stump* v. *Sparkman,* 435 U.S. 349 (1978); *Pierson* v. *Ray,* 386 U.S. 547 (1967).

The absolute immunity provided judicial officers has not been limited to officers of the judicial branch. Although this Court has held that ordinarily officials of a state executive branch of government enjoy only a qualified immunity under 42 U.S.C. §1983, *Wood* v. *Strickland,* 420 U.S. 308 (1975); *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), it has also held that the quasi-judicial functions exercised by certain officials of the executive branch clothes them with the same type of absolute immunity enjoyed by judicial officers. For instance, in *Imbler* v. *Pachtman,* 424 U.S. 409 (1976), such absolute immunity was extended to state prosecutors. More recently, in *Butz* v. *Economou,* 438 U.S. 478 (1978), this Court extended the protection of absolute immunity to administrative hearing officers and administrative law judges as well as those agency officials who perform functions analogous to those of a prosecutor, such as determining whether an administrative proceeding should be initiated and determining an appropriate sanction. Similarly, agency attorneys conducting an administrative proceeding and presenting evidence on the record to the hearing officer or administrative law judge enjoy absolute immunity.

In reaching this decision, this Court determined that adjudications within an administrative agency share many of those characteristics of the judicial process which require absolute immunity. For instance, the conflicts which administrative hearing officers must resolve are as "fractious" as judicial conflicts and therefore just as likely to result in an attempt by a dissatisfied party to challenge the decision. Further, similar to the judicial process, the process of agency adjudication is structured such that the hearing officer or administrative law judge must exercise his judgment solely upon the evidence before him. Thus, this Court found the risk of an unconstitutional act by such officer reduced. Similarly, with respect to the state official functioning as a prosecutor in determining whether to bring an administrative action and to seek particular sanctions and in presenting evidence at an administrative hearing, the Court noted the need to insure that the exercise of the broad discretion involved is independent and free from fear of future law suits, noting the "serious danger" that a decision to authorize proceedings or to present certain evidence or witnesses will provoke retaliatory responses. On the other hand, the potential for unconstitutional acts was found to be reduced by the opportunity afforded a party in an enforcement proceeding to challenge the legality of the determination to bring the proceedings by argument to the hearing officer and to challenge the presentation of evidence and witnesses through cross-examination.

The application of absolute immunity to parole adjudications, if anything, is even more appropriate. Such adjudications have consistently been considered quasi-judicial in nature, necessitating the application of absolute immunity. *Thompson* v. *Burke*, 556 F.2d 231 (3rd Cir. 1977); *Pope* v. *Chew*, 521 F.2d 400 (4th Cir. 1975); *Keeton* v. *Procunier*, 468 F.2d 810 (9th Cir. 1972), *cert.* den. 411 U.S. 987 (1973); *Silver* v. *Dickson*, 403 F.2d 642 (9th Cir. 1968), *cert.* den. 394 U.S. 990 (1969); *Pate* v. *Alabama Board of Pardons and Paroles*, 409 F.Supp. 478 (M. D. Ala. 1976), aff'd 548 F.2d 354 (5th Cir. 1977); *Bricker* v. *Michigan Parole Bd.*, 405 F.Supp. 1340 (E.D. Mich. 1975). These cases recognize that, unlike the executive officials and school board members in *Scheuer* and *Wood*, members of parole boards in granting, denying or revoking parole act in a quasi-judicial capacity and in effect are an extension of sentencing functions performed by judges. In fact, this Court has recently characterized such parole determinations as ". . . much like a sentencing judge's choice . . . to grant or deny probation . . ." *Greenholtz* v. *Inmates of Nebraska Penal & Cor., supra*, 99 S.Ct. at 2108.

The need for free exercise of judgment in the parole adjudication context is even more apparent than is the need for such freedom in administrative hearings. Parole adjudications are highly predictive and subjective. As a result, there is no ideal, error-free way to render a parole decision and the process of necessity is to a large degree experimental. As this Court in *Greenholtz* v. *Inmates of Nebraska Penal & Cor.*, 99 S.Ct. at 2107 noted:

> "In parole releases, like its siblings probation release and institution rehabilitation, few certainties exist. In each case, the decision differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observations filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community. This latter conclusion requires the Board to assess whether, in light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others and undermine respect for the administration of justice. The entire inquiry is, in a sense, an 'equity' type judgment that cannot always be articulated in traditional findings."

Further, reversal of the Court of Appeals in this case is likely to lead to a sacrifice of the strong policy encouraging rehabilitation in favor of the countervailing policy of deterrence and to encourage a multiplicity of litigation by inmates whose parole has been denied out of an overbundance of concern over litigation by a potential victim. This clearly would be a undesirable result.

In a case involving facts strikingly similar to the facts herein (parolee raped and murdered plaintiff's daughter) in which absolute immunity was applied, it was observed by the court that:

> "Parole officials bear a more than ordinary responsibility because of the dangerous traits already demonstrated by those with whom they must deal. This responsibility imposes far greater moral burdens and requires far more difficult legal choices than those met by the average administrative officer. The function of the Parole Board is more nearly akin to that of a judge in imposing sentence or granting or denying probation than it is to that of an executive administrator. It is essential to the proper administration of criminal justice that those

> who determine whether an individual shall remain incarcerated or be set free should do so without concern over possible personal liability at law for such criminal acts as some parolee will inevitably commit; in other words, that such officials should be able to exercise independent judgment without pressure of personal liability for acts of the subject of their deliberations." *Pate* v. *Alabama Board of Pardons and Paroles, supra,* 409 F.Supp. at 479.

Because of the highly sensitive, predictive nature of parole decisions, the proceedings are not as formalized as, for instance, the administrative hearings considered in *Butz.* However, the adjudication must be based upon the inmate's record, the inmate must be afforded an opportunity to be heard and to insure that his records are accurate and the inmate must receive notice of the adjudication. Moreover, the inmate ordinarily may challenge the parole determination in court. Thus, there are some procedures required in parole proceedings which do protect against an erroneous decision. It is, moreover, evident that while such protections are factors to be considered in determining whether absolute immunity applies, it is clear that they are not the overriding factors, particularly where, as here, the countervailing necessity for the protection afforded by absolute immunity far outweighs the concern for error-free judgment. And, while the more formalized procedures afforded in administrative hearings and Court proceedings might provide protection to the parties against unconstitutional decisions, it is not the interests of the parties which are involved herein. Appellants seek protection for the parolee's potential victim, a member of the general public. The safeguards of the administrative and court proceedings

provide no more protection to this category of individuals than would safeguards in the parole procedures.

In sum, parole adjudication is clearly quasi-judicial in nature. There is, moreover, a significant need to insure that such adjudications are protected against potential suits for damages, particularly in view of the highly predictive and subjective nature of the adjudication. Although safeguards afforded by the procedure to protect against unconstitutional decisions are not as extensive as those which accompany judicial and administrative hearing decisions, the potential for unconstitutional adjudication is far outweighed by the need to insure a free exercise of parole judgment.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals of the State of California should be affirmed.

Respectfully submitted,

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for the State of New Jersey.

ERMINIE L. CONLEY,
Assistant Attorney General,
Of Counsel and
On the Brief.

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IN THE

Supreme Court of The United States

October Term 1978

No. 78-1268

GEORGE MARTINEZ, et al.,
Appellants,

vs.

THE STATE OF CALIFORNIA, et al.,
Respondents.

On Appeal From The Court Of Appeal
Of The State Of California,
Fourth Appellate District, Division One

BRIEF AMICUS CURIAE OF THE STATE OF OHIO IN SUPPORT OF RESPONDENTS THE STATE OF CALIFORNIA, et al.

WILLIAM J. BROWN
Attorney General of Ohio
SIMON B. KARAS
GEORGE STRICKER, JR.
DENNIS L. SIPE
Assistant Attorney Generals
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414
Attorneys for Amicus Curiae
The State of Ohio

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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IN THE

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vs.
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Respondents.

On Appeal From The Court Of Appeal
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Fourth Appellate District, Division One

BRIEF AMICUS CURIAE OF THE STATE OF OHIO IN SUPPORT OF RESPONDENTS THE STATE OF CALIFORNIA, et al.

INTEREST OF AMICUS

Pursuant to Supreme Court Rule 42 (4) the State of Ohio respectfully submits this brief amicus curiae in support of Respondent the State of California.

The State of Ohio submits that the questions presented in this action are of national importance and the decision rendered by this Court will have far reaching consequences for the States of this Union.

The State of Ohio maintains to this Court that the action commenced in the State of California failed

to meet the threshold requirement of 42 U.S.C. Section 1983, to wit: a deprivation of a Constitutional right without due process of law. The action below sets forth at best a state tort claim, far short of a cognizable constitutional violation.

Additionally, Amicus strongly urges that parole boards must be afforded absolute immunity for their decisions concerning the release of convicted individuals on parole. To afford parole board members a qualified immunity would fail to insulate these individuals from the threat of lawsuit concerning quasi-judicial decisions that inherently involve an unknown predictive question with few certainties.

In order to inform this Court of the State of Ohio's concerns in these areas of the law, this brief is submitted for the Court's consideration.

STATEMENT OF THE CASE

Amicus hereby adopts the statement of the case set forth in the brief of the Respondents.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is reported at 85 Cal. App. 3d 430 (1978).

ARGUMENT

I. A WRONGFUL DEATH CLAIM BASED UPON THE UNLAWFUL ACTS OF A PERSON RELEASED FROM CUSTODY BY STATE OFFICIALS FAILS TO ALLEGE THE DEPRIVATION OF A CONSTITUTIONALLY PROTECTED RIGHT WITHOUT DUE PROCESS OF LAW

Amicus respectfully submits Appellants' federal civil rights claim fails to meet the threshold requirements of 42 U.S.C. Section 1983.

It is elementary in federal civil rights law that in order to properly make out a cause of action pursuant to 42 U.S.C. Section 1983 it must be alleged and shown that a person or persons acting under color of law deprived another of a right guaranteed by the U.S. Constitution and in violation of the U.S. Constitution. *Adickes v. S.H. Kress Co.*, 398 U.S. 144 (1970). This proposition consists of two elements: (1) that the defendant was acting under color of law; (2) that the defendant caused the plaintiff's civil rights to be violated. *Puckett v. Cox*, 456 F. 2d 233 (6th Cir. 1972).

Appellants' fifth claim alleged that Richard June-Jordan Thomas, a parolee, following his release kidnapped and murdered Mary Ellen Martinez. The complaint alleged the acts of the California Parole Board members in releasing this parolee were negligent and reckless. These acts were alleged to have deprived the decedent of life without due process of law in violation of 42 U.S.C. Section 1983.

Amicus respectfully submits the allegations as summarized immediately above do not meet the requirements of the aforementioned case law. It has not been

alleged nor can it be proven under the alleged facts that the decedent's civil rights were violated.

Appellants' complaint is based upon a theory that the Fourteenth Amendment to the U.S. Constitution guarantees citizens the right to be protected from dangerous persons held in the custody of a state institution and when state officials do not so protect citizens they have violated their Fourteenth Amendment rights. Amicus knows of no case law which would support this proposition.

Instead of basing their complaint upon an independent and specific constitutional right and the Respondents' violation thereof, appellants are left with an alleged Fourteenth Amendment violation from the fact that persons acting under color of law deprived decedent of her life. Thus, since the Fourteenth Amendment expressly states:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty or property without due process of law; . . .

Appellants' complaint must equate the deprivation of life which has allegedly been caused by persons acting under color of law with a violation of due process. Under this theory, every time one acts under color of law so as to result in the death of another he has violated the Due Process Clause of the Fourteenth Amendment.

In a similar situation, this Court in *Paul v. Davis*, 424 U.S. 693 (1976), held that a defamation action in which the defendant was acting under color of law, did not rise to a constitutional tort level simply because it was committed with state action. In *Paul v. Davis*,

supra, the Chief of Police of Louisville, Ky., had authorized the circulation of flyers on which the plaintiff's name appeared as a shoplifter. Plaintiff, who had been arrested but not convicted on a shoplifting charge, subsequently brought a civil rights action for damages as well as declaratory and injunctive relief. Mr. Justice Rehnquist rejected the plaintiff's contention that his due process rights were violated in that the police chief's action deprived him of liberty. He stated:

> If respondent's view is to prevail a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under Section 1983. And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under Section 1983.
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shephered the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent. 424 U.S. 693 at 698, 699.

He then analyzed several decisions in which the Court had previously held that due process was violated by

the government in the context of a situation where "liberty" was at stake. He concluded that in each of these cases due process was applicable because the right or status at stake had been recognized by either federal constitutional law [*Monroe v. Pape*, 365 U.S. 167 1961)] or state law [*Goss v. Lopez*, 419 U.S. 565 (1975); *Morrissey v. Brewer*, 408 U.S. 471 (1971); *Bell v. Burson*, 402 U.S. 535 (1971)]. Thus, without such an independent basis, the facts in *Paul* did not give rise to a constitutional tort.[1]

It cannot be argued that by virtue of the right to life having been determined in several contexts to be "fundamental" this makes out the requirements of the *Paul v. Davis*, *supra* test. Amicus would agree with appellants that because "life" expressly appears in the Fourteenth Amendment it is a recognized right. However, this alone does not satisfy this Court's test.[2] The independent basis which must be established by state, federal, or constitutional law which satisfies the test is dependent upon the relationships and duties at stake arising between the parties. As has been discussed above, there is no state, federal, or constitutional relationship which has been recognized and which arises between the general public and state institutional officials. The only such duties have arisen on the basis of public policy and create nothing more than a state tort action. See for example *Grimm v. Arizona Board*

[1] Most recently, this Court applied identical rationale in a false imprisonment damage action brought under the Federal Civil Rights Act against a county sheriff. *Baker v. McCollan*, —— U.S. ——, 47 U.S. L.W. 4823. (Decided June 26, 1979).

[2] For instance, in *Parham v. Hughes*, —— U.S. ——, 60 L. Ed. 2d 269, 279, f.n. 11 (1979), this Court indicated that a statutory entitlement to sue for the wrongful death of another is not itself a fundamental or constitutional right.

of Pardons and Paroles, 115 Ariz. 260, 564 P. 2d 1227 (1977). Thus, appellants' complaint fails to meet the requirements of 42 U.S.C. Section 1983.

II. PAROLE BOARD OFFICIALS HAVE AN ABSOLUTE IMMUNITY FOR THEIR QUASI-JUDICIAL DECISIONS CONCERNING THE RELEASE OF CONVICTED INDIVIDUALS ON PAROLE.

Should this Court determine that the complaint states a cause of action cognizable under the Federal Civil Rights Act Amicus submits Respondents are absolutely immune from liability for their quasi-judicial decisions. To arrive at this conclusion an analysis of the role and function state parole boards perform in our judicial systems is necessary.

To be sure, individuals serving on the parole board are members of the Executive Branch of State Government, but this is not dispositive of the issue presented. This Court has recently held in *Butz v. Economou*, 438 U.S. 478 (1978), that a functional analysis of the judgments made must be undertaken to determine whether to label a governmental function judicial or executive.

> "It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well." *Imbler v. Pachtman*, 424 US, at 423 n 20, 47 L Ed 2d 128, 96 S Ct 984. *Butz v. Economou*, 438 U.S. at 512.

Appellants choose to avoid this analysis and instead prefer to rely upon authorities involving executive officials performing executive functions. *Wood v.*

Strickland, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). As noted above, this approach ignores the special function of the parole board in the release decision making process.

As this Court has most recently recognized in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, —— U.S. ——— 47 U.S. L.W. 4581 (1979):

> The parole release decision, however, is more subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release. Unlike the revocation decision, there is no set of facts which, if shown, mandate a decision favorable to the individual. The parole determination, like a prisoner transfer decision, may be made 'for a variety of reasons and often involve no more than informed predictions as to what would best serve [correctional purposes] or the safety and welfare of the inmate.' *Meachum v. Fano, supra*, at 225. The decision turns on a 'discretary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done.' Kadish, The Advocate and the Expert-Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 813 (1961). *Greenholtz v. Inmates, supra*, at 4583.

Moreover, the parole release decision is identical to the decision a judge must make when asked to release a convicted individual on probation.

Both the Court and parole board are deciding whether a convicted individual will serve his lawful sentence to completion. Certainly both are concerned with the safety of society and the benefits to the convicted person seeking this early release.

To follow the reasoning advanced by appellants would leave judges with at best a qualified immunity for decisions relating to probation. This result could only be contrary to this Court's holding in *Imbler v. Pachtman*, 424 U.S. 409 (1976), *Butz v. Economou, supra* and *Bradley v. Fisher*, 13 Wall (80 US) 335, 20 L. Ed. 646 (1872).

One would be hard pressed to theorize that a judge reaches a probation release decision utilizing a totally different thought process than the parole board uses when presented with a parole release decision. Both considerations involve the welfare of the public and the affected convicted individual. In summary, the judgment exercised is the same in both instances.

In addition, this Court has held that the decision whether to revoke parole or probation must be accomplished in similar constitutional fashion. *Morrissey v. Brewer, supra, Gagnon v. Scarpelli*, 411 U.S. 778 (1973). It is submitted that the need to treat the two statuses equally prior to revocation, is strong evidence that the same factors and considerations were involved during the release determination phase.

This Court has often stated that there are few doctrines more settled than the immunity of judges from liability for damages within their judicial jurisdiction. *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Imbler v. Pachtman, supra; Butz v. Economou, supra.* The enunciation of this doctrine in *Bradley v. Fisher, supra*, stemmed from the realization that judges must be free to exercise their discretion and judgment insulated from outside pressures. This is true despite the possibility such actions or decisions would or might stem from an improper motive.

Absolute immunity has been afforded to others connected with the judicial process as well. Grand jurors,

petit jurors, advocates and witnesses *Yaselli v. Goff*, 275 U.S. 503, 72 L. Ed. 395, 48 S. Ct. 155 (1927), *affg. mem.* 12 F. 2d 396 (2nd Cir. 1926); *Imbler v. Pachtman, supra* are absolutely immune from damages also. The reasoning behind these decisions remain the same; insulation from harassment by lawsuit and insurance that the decision will be based upon reason not fright.

This doctrine, as this Court is well aware, is not new. It existed during the formative years of our country. See 1 W Hawkins, Pleas of the Crown, 349 (6th Ed. 1787) quoted in *Yaselli v. Goff, supra* at 403. As noted above this Court adopted it in *Bradley v. Fisher, supra* in 1872.

This Court is now faced with a decision that concerns our American parole system which this Court has properly noted is in its formative years. *Greenholtz v. Inmates, supra*, 47 U.S. L.W. at 4583. To follow the course proposed by appellants might well spell the end for the parole system still in its "experimental stages". Their position fails to perceive the need for a parole system and, most importantly fails to consider the enormous pressures such systems experience.

As noted above, this Court has found the parole decision making process to be a product of assessing imponderables and acting upon that assessment. *Greenholtz v. Inmates, supra.* Inheritant in such a system must be the right to be wrong. The entire process lacks clear scientific laws and precise measurements. Rather the system depends entirely on subjective evaluations utilizing the judgments of individuals that bring with them their experiences in life and the hope that their predictions are correct. Experience has taught us that often these predictions are not always correct.

In Ohio the inmate population is approximately 13,600 and the seven member parole board hears 11,161 number of applications per year. They granted 5346 paroles with 1048 parolees being returned in 1978 to the correctional system.[3] To hold each parole board member liable in damages for his predictive judgment, with the given fact that approximately 19.6 percent of Ohio's parolees will return, is a burden too onerous to impose upon any individual.

It is asserted that the position expounded herein is not without authority among the Circuit Courts of Appeal and the District Courts. See *Bricker v. Michigan Board of Parole*, 405 F. Supp. 1340, 1345 (E.D. Mich. 1975); *Pate v. Alabama Board of Pardons and Parole*, 409 F. Supp. 478, (M.D. Ala. 1976); *affd.* 548 F. 2d 354 (5th Cir. 1977); *Ammlung v. City of Chester*, 355 F. Supp. 1300 (W.D. Pa. 1973) citing *Pierson v. Ray*, 386 U.S. 547 (1967), *affd.* 494 F. 2d 811 (3rd Cir. 1974); *Pennebaker v. Chamber*, 437 F. 2d 66 (3rd Cir., 1970); *Winterhalter v. Three Rivers Motor Co.*, 313 F. Supp. 962 (W.D. Pa. 1970); *Pope v. Chew* 521 F. 2d 400, 405 (4th Cir. 1975); *Silver v. Dickson*, 403 F. 2d 642 (9th Cir. 1968), *cert. denied*, 394 U.S. 990 (1968); *McCray v. State of Maryland*, 456 F. 2d 1 (4th Cir. 1972). This is not to say that these Courts have correctly foretold how this Court will reach its decision, but it is strongly urged that it does evidence the concern these Courts had for parole board members exercising parole release decisions and the analysis these Courts have made concerning the nature of the parole release decision. It is submitted that there is a need to afford absolute immunity from liability to parole board mem-

[3] Statistics from Ohio's Division of Parole and Community Services Annual Report, Tables I, II, III, pp. 20, 21, 22.

bers concerning parole release decisions; a need firmly grounded upon law and sound public policy. *Butz v. Economou, supra.*

CONCLUSION

Appellants have failed to pass the threshold test necessary in all actions filed pursuant to 42 U.S.C. Section 1983. This action presents no deprivation of a constitutional right without due process of law. *Paul v. Davis, supra.*

Lastly, the members of a parole board must be absolutely immune from liability for parole release decisions in order that their quasi-judicial decisons may be made in an atmosphere free from all outside influences. *Imbler v. Pachtman, supra; Butz v. Economou, supra.*

Therefore, this Court should affirm the decision of the California Court of Appeals.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

SIMON B. KARAS
GEORGE STRICKER, JR.
DENNIS L. SIPE
Assistant Attorney Generals
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Brief of Amicus Curiae upon counsel of record for the Respondent, Honorable Jeffrey T. Miller, Deputy Attorney General, State of California, 110 West A-Suite 600, San Diego, California 92101, counsel for Appellants, Donald McGrath II, Suite 1405, 1200 3rd Avenue, San Diego, California, 92101, and one copy to counsel for Amicus Curiae, Americans for Effective Law Enforcement, Inc., Frank Carrington, 4530 Oceanfront, Virginia Beach, Virginia, 23451, counsel for Amicus Curiae, Pacific Legal Foundation, Ronald Zambrun, 455 Capital Mall, Suite 465, Sacramento, California 95814, pursuant to the requirements of Rule 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class postage prepaid, addressed to all counsel of record as set forth above, on or before August 20, 1979.

I further certify that I am a member of the bar of this Court, and that all parties required to be served have been served on or before August 20, 1979.

SIMON B. KARAS
Counsel for Amicus Curiae
State of Ohio

FOR ARGUMENT

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No. 78-1268

In the Supreme Court of the United States

OCTOBER TERM, 1978

GEORGE MARTINEZ, ET AL., APPELLANTS

v.

STATE OF CALIFORNIA, ET AL.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Acting Assistant Attorney General

KENT L. JONES
Assistant to the Solicitor General

ROBERT E. KOPP
BARBARA L. HERWIG
Attorneys
Department of Justice
Washington, D.C. 20530

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Hoffman and Beck, *Salient Factor Score Validation—A 1972 Release Cohort*, 4 J. of Crim. Just. 69 (1976) 22
Hoffman and DeGostin, *Parole Decision-Making: Structuring Discretion*, 38 Fed. Prob. 9 (Dec. 1974) 10

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1268

GEORGE MARTINEZ, ET AL., APPELLANTS

v.

STATE OF CALIFORNIA, ET AL.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will address the following question:

Whether, with respect to the decision to release a prisoner on parole, state parole board officials are absolutely immune from liability in suits for damages under 42 U.S.C. 1983.

INTEREST OF THE UNITED STATES

Officials of the United States Parole Commission make parole determinations that are similar to the

parole determinations made by state parole board officials. In *Butz* v. *Economou*, 438 U.S. 478 (1978), this Court concluded that the immunity from liability accorded federal officials "when sued for a constitutional infringement as authorized by *Bivens* [v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)]," will ordinarily parallel the immunity accorded "state officials when sued for the identical violation under [42 U.S.C.] § 1983." 438 U.S. at 500. The decision the Court renders in this case will thus foreshadow, if not actually resolve, the scope of the immunity from personal liability that is accorded to federal parole officials.

The United States has a substantial interest in participating in this case because the nature of the immunity enjoyed by federal parole officials may significantly affect the ability of such officials to perform their duties properly and effectively. In particular, the specter of personal liability in damages as a result of a decision to grant or deny parole would have an adverse impact on the operations of the federal parole system by deterring parole officials from the free and independent exercise of the discretion imposed in them by law. Because of the importance of the parole process to the effective functioning of our criminal justice system, the United States submits its view here that parole officials should be accorded an absolute imunity from personal liability with respect to their decisions to release prisoners on parole.[1]

[1] We do not address the first question presented on this appeal, which is whether the California statute that grants an absolute immunity to state parole officials from personal liability under state tort law is unconstitutional (J.S. 5). The California Court of Appeal (A. 42), the appellants (Br. 15), and the appellees (Br. 22-56, 68-69) all correctly observe that the state immunity statute is not applicable to any liability established under federal law.

Nor do we comment on the question not presented in the jurisdictional statement but briefed by both parties—whether 42 U.S.C. 1983 establishes liability for "negligent" or "reckless" conduct that causes a person to be deprived of a constitutional right (Appellants' Br. 32-35; Appellees' Br. 57-66). This issue was not raised in or considered by either court below, and there are no special circumstances warranting the court's review of the issue at this time. See, *e.g.*, *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969). The issue may be raised and considered, if necessary, on remand. Cf. *Wood* v. *Strickland*, 420 U.S. 308, 327 (1975).

For the same reasons, we also do not discuss the question briefed by appellees (Br. 14-22) but not raised in or considered by the courts below as to whether a parole release decision can be said to have "caused" (42 U.S.C. 1983) the deprivation of a constitutional right when it is alleged only that a released prisoner subsequently inflicted injury on a third person.

STATEMENT

On August 1, 1975, Richard Thomas kidnapped and murdered Mary Martinez in San Diego County, California. This crime—for which Thomas was eventually convicted and sentenced to death—was committed five months after Thomas had been released on parole from a state prison, where he had been committed after his conviction for attempted rape. At the time of Thomas' release from prison on parole, he had served five years of a one-to-twenty year sentence (A. 23).

Plaintiffs, the parents, brother and sister of Mary Martinez, filed this suit for damages in the Superior Court of San Diego County, naming as defendants the State of California and its parole officials. The complaint, as amended, alleged that the defendants were negligent and reckless in releasing Thomas on parole, in failing to comply with state parole procedures in the decision to release Thomas, in failing to supervise Thomas after his release, and in failing to warn females in the Tecolote Canyon area of San Diego County of Thomas' release (A. 22-28).[3] Plaintiffs also alleged that the defendants, acting under color of state law, by their negligent, malicious and reckless conduct in releasing Thomas on parole, caused the deprivation of Mary Martinez' life without due process of law, in violation of 42 U.S.C. 1983. Plaintiffs sought $1,000,000 in compensatory damages for loss of the "care, comfort, support, protection and society" (A. 24) of Mary Martinez and also sought $1,000,000 in punitive damages (A. 28, 29, 31).

The defendants demurred to the complaint on the ground that it failed to state a cause of action. The superior court sustained the demurrer, and the state court of appeal affirmed (A. 16-18, 35-37, 38-44).

[3] Plaintiffs eventually conceded on appeal that their claim premised upon the defendants' failure to warn females of Thomas' release "should be dismissed because there was no continuing relationship between the State and the victim" (A. 41).

The court of appeal held that appellants' claims seeking relief under state law are barred by California Government Code 845.8(a), which provides an absolute immunity from liability for parole officials with respect to "[a]ny injury resulting from determining whether to parole or release a prisoner * * *." The court rejected appellants' contention that the state statute is unconstitutional, noting that the legislaure has broad authority to determine governmental tort liability. The court emphasized (A. 44) that the legislative determination to provide an absolute immunity for parole officials is rational, because

> [t]o impose tort liability would have a chilling effect on the decision making process, impede implementation of trial release programs and prolong incarceration unjustifiably for many prisoners.

The court also held that parole officials "are performing quasi-judicial functions when they make determinations regarding parole" and are therefore entitled to an absolute immunity from liability under 42 U.S.C. 1983 for parole release decisions (A. 42).

ARGUMENT

PAROLE OFFICIALS ARE ABSOLUTELY IMMUNE FROM PERSONAL LIABILITY IN DAMAGES BASED UPON DECISIONS TO GRANT OR DENY PAROLE

Introduction and Summary

In *Butz* v. *Economou*, 438 U.S. 478, 508 (1978), this Court held that, "[a]lthough a qualified immunity from damages liability should be the general

rule for executive officials charged with constitutional violations, * * * there are some officials whose special functions require a full exemption from liability." As we show in Part B below, "the special nature of th[e] responsibilities" (*id.* at 511) imposed on parole officials requires that they be accorded an absolute immunity from damages liability with respect to their decisions to grant or deny parole.

As with the functionally comparable responsibilities of judges, prosecutors and juries within the criminal justice system (see *Imbler* v. *Pachtman*, 424 U.S. 409, 423 n.20 (1976)), the difficult process of evaluating an offender's suitability for parole cannot effectively be performed under the specter of claims of personal liability. Absolute immunity for decisions to grant or deny parole is necessary to ensure that the discretion of parole officials is not distorted by the threat of personal litigation (*Butz* v. *Economou*, *supra*, 438 U.S. at 515) and to ensure that these officials "can perform their * * * functions without harrassment or intimidation" (*id.* at 512). For parole officials—as for sentencing judges, prosecutors and juries—the minimal risk of intentional misconduct is clearly outweighed by the importance to the criminal justice system of preserving "the independent judgment of these men and women" (*id.* at 514).

To place this discussion within its proper context, we first describe the nature of the parole process within the federal criminal justice system.

A. Federal Parole Officials Perform A Quasi-Judicial Responsibility In Determining Whether Individual Prisoners Should Be Released On Parole

1. The United States Parole Commission is an independent agency established by Congress within the Department of Justice. 18 U.S.C. 4202. Its nine members are appointed by the President, with the advice and consent of the Senate, to serve six-year terms. *Ibid.* The Commissioners are empowered to grant or deny parole for any eligible prisoner, to impose reasonable conditions on parole should it be granted, and to modify or revoke any order granting parole. 18 U.S.C. 4203(b). These powers are exercised pursuant to rules and guidelines adopted by the Commission. 18 U.S.C. 4203(a)(1). See 28 C.F.R. 2.20 *et seq.*

Although parole "originated as a form of [executive] clemency" (S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 19 (1976)), "the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system." *Morrissey* v. *Brewer*, 408 U.S. 471, 477 (1972). In the federal criminal justice system, "parole is a key factor because most Federal prisoners become eligible for parole, and approximately 35 percent of all Federal offenders who are released are released on parole." S. Conf. Rep. No. 94-648, *supra*, at 19. In fiscal year 1978, for example, the United States Parole Commission considered 23,180 cases concerning the grant or revocation of parole. *Report of the United States Parole Commission* 17

(1978). In connection with these cases, the Commission through its parole examiners conducted 18,633 personal hearings, released 7,470 prisoners on parole, and issued 2,574 orders revoking parole. *Id.* at 15-17, 18.

In 1976, in recognition of the burgeoning, complex caseload of required parole decisions, Congress enacted the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219, 18 U.S.C. 4201 *et seq.* The objective of the Act is "to assure the public and imprisoned inmates that parole decisions are openly reached by a fair and reasonable process after due consideration has been given the salient information." S. Conf. Rep. No. 94-648, *supra*, at 20. To accomplish this objective, the Act establishes both substantive and procedural responsibilities for the Commission in its parole decision making process.

In the particular context of parole release decisions,[3] the Act provides that a prisoner eligible for parole[4] shall be released if the prisoner "has substantially observed the rules of the institution" (18 U.S.C. 4206(a)) and

> if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:
>
> (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> (2) that release would not jeopardize the public welfare * * *.

Ibid.[5] This determination is to be made for each prisoner pursuant to guidelines adopted by the Commission (*ibid.*), although "[t]he Commission may grant or deny release on parole notwithstanding the guidelines * * * if it determines there is good cause for so doing." 18 U.S.C. 4206(c).

Pursuant to this statutory directive, the Commission has promulgated guidelines that provide objec-

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[3] Because this case arises from a parole release decision, rather than a parole revocation or conditional release decision, this discussion will focus on the Commission's procedure in reaching release decisions under 18 U.S.C. 4206. We note, however, that the quasi-judicial nature of the Commission's decision making process extends to parole revocation decisions under 18 U.S.C. 4214 and to conditional release decisions under 18 U.S.C. 4209.

[4] The time at which a prisoner first becomes eligible for parole is determined by the choice of sentencing options made by the sentencing court. See, *e.g.*, 18 U.S.C. 4205(a), (b); 18 U.S.C. 4216; 18 U.S.C. 4251-4255. See *United States* v. *Addonizio*, No. 78-156 (June 4, 1979), slip op. 10 & n.15. But "[t]he decision as to when a lawfully sentenced defendant shall actually be released on parole has been committed by Congress, with certain limitations, to the discretion of the Parole Commission." *Ibid.* See also *id.* at 10 n.13.

[5] If a prisoner has been sentenced to a term of imprisonment in excess of five years, he is entitled to be released on parole at the expiration of two-thirds of each consecutive term or 30 years, whichever is earlier, unless the Commission determines that the prisoner "has seriously and frequently violated institution rules" or that there is a reasonable probability that he would commit further crimes. 18 U.S.C. 4206(d). See *United States* v. *Addonizio*, *supra*, slip op. 10 n.13.

tive standards for the application of its broad discretionary authority in granting parole. 28 C.F.R. 2.20.[6] The objective of the guidelines is to "promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration * * *" (28 C.F.R. 2.20(a)).[7] See also *United States* v. *DiRusso*, 535 F.2d 673, 674 (1st Cir. 1976). Consistent with this objective, the guidelines are not inflexible. For each of six general categories of offense severity (*e.g.*, "high" or "low" severity), subdivided into four categories based on offender characteristics (*e.g.*, "good" or "poor" parole prognosis), the guidelines indicate a broad, customary range of confinement to be served by persons with good institutional behavior.[8] 28 C.F.R. 2.20(b). Moreover, the guidelines do not establish customary ranges of confinement for every conceivable offense; instead, they provide several examples of offenses within each severity level. 28 C.F.R. 2.20(d). See *Garcia* v. *United States Board of Parole*, 557 F.2d 100, 106 & n.6 (7th Cir. 1977). Mitigating or aggravating circumstances relating to the offense of a particular prisoner, as well as the prisoner's institutional performance, may justify a decision to release a prisoner outside the guidelines' range of customary release dates.[9] 28 C.F.R. 2.20(c), (d), (e). The Commission has generally reserved discretion to depart from the guidelines whenever it concludes that the circumstances of the particular prisoner's case so warrant. 28 C.F.R. 2.18, 2.20(c).

Individual case consideration is an essential component of the federal parole system because the Commission must, in each case, scrutinize the particular circumstances of the prisoner and his offense to determine how, if at all, the guidelines are to be applied

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[6] The federal parole guidelines are described at length in the government's brief in *United States Parole Commission* v. *Geraghty*, No. 78-572 (Br. 51-88), which presents a challenge to the validity of the guidelines under the Parole Commission and Reorganization Act and the Constitution. We are supplying appellants and appellees with a copy of our brief in *Geraghty*.

[7] See Hoffman and DeGostin, *Parole Decision-Making: Structuring Discretion*, 38 Fed. Prob. 9 (Dec. 1974):

> By providing a specific policy range and requiring a written explanation for each decision outside this range, the guidelines endeavor to structure discretion without removing it, and thus permit more rational and consistent decisionmaking.

[8] The Commission utilizes a separate set of guidelines in determining whether prisoners should be reparoled after parole has been revoked for administrative violations of parole conditions not involving new criminal conduct. 28 C.F.R. 2.21(a), 2.34(g)(1).

[9] Factors suggested by Congress as justifying a parole release determination above the guidelines were "whether or not the prisoner was involved in an offense with an unusual degree of sophistication or planning, or has a lengthy [prison] record, or was part of a large scale conspiracy or continuing criminal enterprise." On the other hand, a decision below the guidelines might be justified by such factors as "a prisoner's adverse family or health situation." S. Conf. Rep. No. 94-648, *supra*, at 27; H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 27 (1976).

to him.[10] If the guidelines are found applicable to the prisoner, the Commission must then establish a precise release date within the broad range of customary release dates (*e.g.*, 26-36 months) indicated by the guidelines. If the guidelines are found inapplicable, the Commission must determine what release date, if any, is appropriate on the basis of the particular facts of the prisoner's case. The extensive nature of these individual parole inquiries is illustrated by the fact that, in 1978, approximately 11% of the 13,957 individual decisions to release prisoners on parole deferred the date of release beyond the guideline range. During this same period, approximately 10% of the Commission's decisions granted release before the guideline range. *Report of the United States Parole Commission, supra,* at 15, 19.

Several procedural requirements were enacted in the Parole Commission and Reorganization Act to ensure the fairness of the Commission's parole release decisions.[11] Before the Commission may con-

[10] A prisoner whose personal history and offense are such that he would ordinarily be released within the guideline range may be removed from guideline consideration because of poor institutional performance. In emphasizing that "the Parole Commission [should] reach a judgment on the institutional behavior of each prospective parolee * * *" (S. Conf. Rep. No. 94-648, *supra,* at 25), Congress stated that "an understanding by the prisoner of the importance of his institutional behavior is crucial to the maintenance of safe and orderly prisons." *Ibid.*

[11] Congress enacted the procedural requirements set forth in *Morrissey* v. *Brewer, supra,* for parole revocation proceedings. 18 U.S.C. 4214(a). Similar procedures were adopted

sider a prisoner for parole, the prisoner must be given advance notice of his parole hearing and access to any "report or other document to be used by the Commission in making its determination." 18 U.S.C. 4208(b).[12] Parole examiners are appointed by the Commission to conduct individual parole hearings and to recommend decisions to the Commission. 18 U.S.C. 4203(c)(1). The prisoner is entitled to be represented at the parole hearing and to appear and testify on his own behalf. 18 U.S.C. 4208(d), (e). In each parole release decision, the Commission is directed to consider the reports and recommendations provided to the Commission by the prison staff and the sentencing court, as well as "such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available." 18 U.S.C. 4207.

If parole is denied, the prisoner is entitled to a written statement of "the reasons for such denial" (18 U.S.C. 4206(b); see also 18 U.S.C. 4206(c)) and a "full and complete record of [the] proceeding * * *" (18 U.S.C. 4208(f)). If the parole examiner recommends that parole be denied, the prisoner may apply for reconsideration by the regional commissioner. 18 U.S.C. 4215(a). If the regional commis-

for the determination the Commission must make after a prisoner has been paroled for five years (18 U.S.C. 4211(c)(1)) whether to terminate parole supervision. 18 U.S.C. 4214(a)(2). See also 18 U.S.C. 4209(d)(1) (requiring notice and an opportunity to be heard before conditions of release may be modified during the period of parole supervision).

[12] Limited exceptions to the disclosure requirement are set forth in 18 U.S.C. 4208(c).

sioner also denies the request for parole, the prisoner may appeal that decision to the three commissioners appointed by the Chairman of the Commission to sit as the National Appeals Board. 18 U.S.C. 4215(b); see 18 U.S.C. 4204(a)(5). Although the decision of the National Appeals Board to grant or deny parole is expressly excepted from review under the Administrative Procedure Act as action "committed to agency discretion" by law (18 U.S.C. 4218(d); see 5 U.S.C. 701(a)(2)), prisoners have obtained a form of judicial review of parole decisions in habeas corpus proceedings, in which the denial of parole is upheld if there is a "rational basis" for the Commission's determination. See, *e.g.*, *Zannino* v. *Arnold*, 531 F.2d 687, 691 (3d Cir. 1976).

2. The decisional processes of federal parole commissioners and parole examiners are "functionally comparable" to the quasi-judicial responsibilities performed by a "modern federal hearing examiner or administrative law judge." *Butz* v. *Economou*, *supra*, 438 U.S. at 513. In each parole release decision, the Commission is required to make factual determinations concerning the nature of the prisoner and his offense and whether release would "jeopardize the public welfare" or "depreciate the seriousness" of the crime.[13] 18 U.S.C. 4206(a); see also 18 U.S.C.

[13] Although the Parole Commission has adopted an objective system of policy guidelines to structure the exercise of its discretion in making its parole release decisions, 28 C.F.R. 2.20, the Commission's discretion, "though more structured, is still quite broad." *Payton* v. *United States*, 468 F. Supp. 651, 655 n.5 (S.D. Ala. 1979). The guidelines serve as a reference point from which the Commission must analyze each case. 18 U.S.C. 4206(c). But the weight to be given to individual factors considered in the process, and the final determination as to whether a decision should be made above, below or within the guidelines (and at what point within the guidelines), is a judgment made by the Commission's officials upon consideration of all of the facts and circumstances presented in each individual case. S. Conf. Rep. No. 94-648 *supra*, at 28.

4206(c). These determinations are made in a formal proceeding in which the prisoner "is entitled to present his case by oral or documentary evidence." *Butz* v. *Economou*, *supra*, 433 U.S. at 513. When a decision is made, the prisoner is entitled to receive a written set of findings and a transcript of the record (*ibid.*). Because the decisions of the Commission and its examiners are not reviewable within the Executive Branch, they are effectively "insulated from political influence." *Ibid.* Moreover, the prisoner may obtain a form of judicial review of the Commission's decision in habeas corpus proceedings in the district courts.[14] *Zannino* v. *Arnold*, *supra*.

The decision made by parole officials to release a prisoner on parole is also closely analogous to the decision made by a sentencing court to place a convicted offender on probation. See *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, No. 78-201 (May 29, 1979), slip op. 13;

[14] It may also be possible in some circumstances for a prisoner to obtain a writ of mandamus under 28 U.S.C. 1361 to compel the performance of a duty owed him by federal parole officials. See *Smith* v. *United States*, 577 F.2d 1025 (5th Cir. 1978).

Thompson v. *Burke*, 556 F.2d 231, 238 n.13 (3d Cir. 1977); *Pate* v. *Alabama Board of Pardons and Paroles*, 409 F. Supp. 478, 479 (M.D. Ala. 1976), aff'd, 548 F.2d 354 (5th Cir. 1977). Both types of decisions involve "a synthesis of record facts and personal observation filtered through the experience of the decision maker and leading to a predictive judgment as to what is best both for the individual inmate and for the community." *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, *supra*, slip op. 6. As the Chief Justice stated in *Hyser* v. *Reed*, 318 F.2d 225, 236 (D.C. Cir.) (footnote omitted), cert. denied, 375 U.S. 957 (1963):

> While there are distinguishing factors between probation and parole, the underlying purposes are closely allied. In each the entity which grants is the entity which is empowered to revoke. In each situation the revoking authority is being exercised pursuant to explicit statutory authority. Moreover that power is being exercised by a person or persons experienced in sifting and weighing evidence and evaluating the factors involved in the grant or revocation of conditional freedom.

See also *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 n.3 (1973). Thus, in determining whether to grant parole, parole officials are to act with the same latitude exercised by the sentencing court in considering all aspects of the offender's character, personal history and criminal conduct. *Billiteri* v. *United States Board of Parole*, 541 F.2d 938, 944 (2d Cir. 1976).

Because of the close similarity between the function of parole and probation within our criminal

justice system and the quasi-judicial nature of the parole decision making process, several courts of appeals have concluded that parole officials are entitled to the same absolute immunity from personal liability in parole decisions that is accorded to the similar exercise of authority by sentencing courts. See, *e.g.*, *Douglas* v. *Muncy*, 570 F.2d 499, 501 (4th Cir. 1978); *Johnson* v. *Wells*, 566 F.2d 1016, 1018 (5th Cir. 1978); *Thompson* v. *Burke*, *supra*, 556 F.2d at 238 n.13.[15] As we show below, this conclusion is supported by the decisions of this Court.

B. Parole Officials Are Entitled To An Absolute Immunity From Personal Liability In The Exercise Of Their Quasi-Judicial Responsibility To Grant Or Deny Release On Parole

The special nature of the responsibility imposed on federal parole officials by law (see *Butz* v. *Economou*, *supra*, 438 U.S. at 508, 511) requires that they be accorded an absolute immunity from personal liability

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[15] See also *Lang* v. *Wood*, 92 F.2d 211, 212 (D.C. Cir. 1937); *Pate* v. *Alabama Board of Pardons and Parole*, *supra*. The Eighth Circuit reserved decision on this issue in *DeShields* v. *United States Parole Commission*, 593 F.2d 354 (1979).

Probation officials who assist the sentencing court by the preparation of presentence reports also have been held absolutely immune from personal liability because the presentence report "is an integral part of the sentencing process" and is performed "at the direction of the court." *Spaulding* v. *Nielson*, 599 F.2d 728, 729 (5th Cir. 1979). See also *Burkes* v. *Callion*, 433 F.2d 318 (9th Cir. 1970).

with respect to decisions granting or denying parole.[16] Absolute immunity for the quasi-judicial responsibility performed by parole officials is "justified since it would * * * sufficiently increase the ability of [parole] officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for [persons] subjected to intentional or otherwise inexcusable deprivation[]," *Wood* v. *Strickland*, 420 U.S. 308, 320 (1975).[17] The reasons that have led this Court to accord an absolute immunity from personal liability to judges, prosecutors and jurors participating in the criminal justice system (see *Imbler* v. *Pachtman*, 424 U.S. 409, 422-423 (1976)) are equally applicable to the functions performed by parole officials.

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[16] Our discussion in this brief focuses on the responsibilities of federal parole officials who, like the state officials involved in this case, must engage in highly discretionary quasi-judicial decisionmaking as part of a formal parole process. Parole systems in which the parole board's role is essentially ministerial or in which the release criteria leave little room for discretion would present different questions concerning the scope of the applicable immunity from damage suits.

[17] The scope of the immunities afforded to officials under 42 U.S.C. 1983 is to be determined by common-law principles. *Wood* v. *Strickland*, *supra*, 420 U.S. at 317, 318; *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967). The statute did not abolish or limit the judicial development of the common law doctrines of immunity. *Butz* v. *Economou*, *supra*, 438 U.S. at 496, 508. Stated in its broadest terms, the common law affords an absolute immunity where it is required by "public policy" and "is essential for the conduct of the public business." *Id.* at 506, 507.

1. As with the prosecutor contemplating the initiation of criminal proceedings or the court imposing sentence, "[t]he public trust [placed in a parole official] would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." 424 U.S. at 424-425. The parole decision serves a central function in the administration of criminal justice (see *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 474) and involves difficult, complex "assessment[s] of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, *supra*, slip op. 8, quoting Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803, 813 (1961). The difficult, predictive judgment made by parole officials is thus "much like a sentencing judge's choice" (slip op. 13). Exposing either the sentencing judge or parole officials to a civil suit for damages "would seriously cripple" (*Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896)) the administration of criminal justice by threatening the freedom and independence of these decision makers. See *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871).

In determining whether to grant parole, the parole officials must consider not only society's interest in just punishment and public safety, but also the interest in rehabilitation and reentry of the prisoner into useful social life. Parole decision makers should

not be made to choose between prolonging the incarceration of a prisoner who is a proper candidate for parole or releasing the prisoner at the risk of subsequent personal liability (or at least time-consuming, costly and disruptive litigation). The parole system would not function effectively if parole officials had to decide in each parole determination whether to fulfill their duty or protect their self-interest; the discretion imposed in them by law "might be distorted if their immunity from damages arising from that decision was less than complete." *Butz* v. *Economou, supra,* 438 U.S. at 515.[18] See also *Pierson* v.

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[18] The court in *Pate* v. *Alabama Board of Pardons and Paroles, supra,* 409 F. Supp. at 479 & n.1, correctly observed that:

> Parole officials bear a more than ordinary responsibility because of the dangerous traits already demonstrated by those with whom they must deal. This responsibility imposes far greater moral burdens and requires far more difficult legal choices that those met by the average administrative officer. The function of the Parole Board is more nearly akin to that of a judge in imposing sentence and granting or denying probation than it is to that of an executive administrator. It is essential to the proper administration of criminal justice that those who determine whether an individual shall remain incarcerated or be set free should do so without concern over possible personal liability at law for such criminal acts as some parolee will inevitably commit; in other words, that such officials should be able to exercise independent judgment without pressure of personal liability for acts of the subject of their deliberations.
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> The system of rehabilitation practiced in this country, involving probation, parole, and pardon, could not be effective if those burdened with the decisions incident thereto were subjected to personal liability for mistakes, the occurence of which is inherent to the system.

Ray, 386 U.S. 547, 554 (1967) (suits by dissatisfied litigants against judges "would contribute not to principled and fearless decision-making but to intimidation").

2. As with judges and prosecutors, suits challenging the decision of parole officials "could be expected with some frequency * * *." *Imbler* v. *Pachtman, supra,* 424 U.S. at 425. See *Bradley* v. *Fisher, supra,* 80 U.S. (13 Wall.) at 354. The Parole Commission disposes of thousands of cases annually in the regular course of its legal duties. See page 8, *supra.* Each of these decisions requires an assessment of the likelihood that the prisoner may engage in dangerous behavior in the future, an assessment that is necessarily tentative and subject to error. As this Court emphasized in *Greenholtz* (slip op. 11):

> No ideal, error-free way to make parole release decisions has been developed; the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the parole decision makers in predicting future behavior.

It therefore reasonably can be anticipated that numerous parole decisions each year will result either in resentment by prisoners who are denied parole or in anger or frustration by third parties who are injured in their persons or property by prisoners who were released on parole. See *Butz* v. *Economou, supra,* 438 U.S. at 512 ("[t]he loser in one forum will frequently

seek another, charging the participants in the first with unconstitutional animus").[19]

In these instances, the "allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into [parole officials] would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence." *Bradley* v. *Fisher*, *supra*, 80 U.S. (13 Wall.) at 354. As with sentencing judges and prosecutors, if parole officials were entitled to only a qualified immunity and were required to prove in each case that they had rendered their decision in good faith (see *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-248 (1974)), it would often be difficult for them to explain the necessarily subjective and complex proc-

[19] The problem of recidivism remains, of course, unsolved in our criminal justice system. The Parole Commission's evaluation of parole prognosis for individual prisoners has proven empirically significant in predicting the risk of recidivism and is thus helpful in determining whether a prisoner's release "[will] jeopardize the public welfare." 18 U.S.C. 4206(a)(2). See generally Hoffman, Meierhoffer and Beck, *Salient Factor Score and Release Behavior: Three Validation Samples*, 2 L. and Human Behavior 47-62 (1978); Hoffman and Beck, *Salient Factor Score Validation—A 1972 Release Cohort*, 4 J. of Crim. Just. 69-76 (1976); Hoffman and Beck, *Parole Decision-Making: A Salient Factor Score*, 2 J. of Crim. Just. 195-206 (1974). But neither this device, nor the Commission's ultimate judgment of parole risk, which must be made upon a consideration of all of the circumstances in each case, is foolproof. See *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, *supra*, slip op. 11. Nothing in the parole legislation enacted by Congress, however, suggests that parole officials are to stand as an insurer for the acts of persons released on parole.

esses of their decisions. Objective factual evidence may play only a small role in a particular parole determination yet may weigh heavily in a jury's assessment of the good faith of the parole officials. Moreover, requiring parole officials to defend their motives in rendering thousands of parole decisions annually, in civil proceedings initiated perhaps several years after the decisions are made, would impose an intolerable burden that could discourage qualified persons from assuming this public responsibility and hinder the free exercise of their independent judgment. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 425-426. An absolute immunity for parole officials is thus necessary to preserve "the vigorous and fearless performance of [a] duty that is essential to the proper functioning of the criminal justice system." *Id.* at 427-428.

3. An absolute immunity of parole officials from liability for parole decisions would "not leave the public powerless to deter misconduct * * *." *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 429. A prisoner who is denied parole has ample means to curb abuse in official action, both by invoking the Commission's internal appellate procedures and (in appropriate circumstances) by seeking a writ of habeas corpus in federal court. See pages 13-14 and note 14, *supra*. There are, moreover, independent checks that minimize the risk that an intentional deprivation of the rights of third persons will occur. As with state prosecutors and judges, the willful deprivation of constitutional rights by state parole officials could

subject them to criminal liability under 18 U.S.C. 242. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 429. In addition, the parole decision is often made in a collegial context,[20] which minimizes the possibility of intentional, individual misconduct. And, to the extent that civil and criminal remedies are available to punish a criminal at the instance of the victim, those remedies remain available to afford some redress against released prisoners for the crimes they commit while on parole.

This Court has, in any event, never held that absolute immunity from liability is appropriate only if constitutional deprivations will not occur. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427.[21] To the contrary, the Court has recognized that even though

[20] See, *e.g.*, 18 U.S.C. 4215(b) (review by three-member National Appeals Board).

[21] Nor has the Court held that absolute immunity is available only in the context of fully adversary proceedings. See, *e.g.*, *Stump* v. *Sparkman*, 435 U.S. 349, 363 n.12 (1978). The decision to prosecute or to indict is not made in an adversary proceeding. The interests of third parties in the prosecution of a criminal are no more directly represented before a prosecutor than are the interests of similar persons before parole officials. Yet the prosecutor is absolutely immune from personal liability with respect to his decision to prosecute, *or not to prosecute*, for any particular offense. *Imbler* v. *Pachtman*, *supra*. A decision not to prosecute (like a decision to grant parole) is not reviewable in any adversary judicial proceeding. Similarly, the decision of a sentencing court to place a convicted offender on probation, rather than in prison, or to sentence him to a lesser rather than a greater term of imprisonment, is not reviewable by third parties in any adversary proceeding. Yet the judge is absolutely immune from liability for his sentencing decision.

some risk of unconstitutional conduct may exist, it "would disserve the broader public interest" for the threat of personal damages to obstruct the effective functioning of the federal criminal justice system. *Ibid.* For parole officials—as for sentencing judges, prosecutors and juries—the minimal risk of intentional misconduct is clearly outweighed by the importance to the criminal justice system of assuring that these officers "can perform their * * * functions without harrassment or intimidation." *Butz* v. *Economou*, *supra*, 438 U.S. at 512. Because the objectives of criminal justice implemented within the parole system require that "the independent judgment of these men and women" (*id.* at 514) be preserved, parole officials should be absolutely immune from personal liability in suits challenging parole decisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Acting Assistant Attorney General

KENT L. JONES
Assistant to the Solicitor General

ROBERT E. KOPP
BARBARA L. HERWIG
Attorneys

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